

NAVAL POSTGRADUATE SCHOOL

Monterey, California



THESIS

**CONTRACT CLAIMS EXPERIENCE
AT THE
NAVAL AIR SYSTEMS COMMAND**

by

John J. Carty, Jr.

June 1999

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**CONTRACT CLAIMS EXPERIENCE AT THE
NAVAL AIR SYSTEMS COMMAND**

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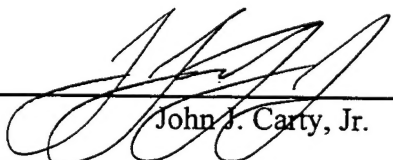
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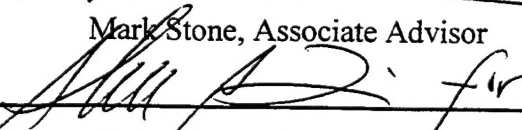
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I. INTRODUCTION

A. BACKGROUND

Contract claims and Requests for Equitable Adjustment (REAs) arising from contract disputes have significant potential for adding cost to a program baseline. The settlement and administration of these claims and REAs tend to be very disruptive to program execution and can impact the ultimate delivery of the product. Additionally, disputes between the Government and the contractor over contract claims and REAs can have a very negative effect on the business relationship between the two parties. In recognition of this, Federal Acquisition Regulation (FAR) 33.204 and Navy Acquisition Procedures Supplement (NAPS) 5233.204-90 stress the importance of maintaining sound business relationships between the Navy and its contractors. To minimize the disruption to programs and resulting costs to the Government, it is worthwhile to examine the causes of contract claims and REAs and attempt to identify actions which can help avoid the situations in which they are generated.

B. PURPOSE

The purpose of this thesis is to analyze the database of contract claims and REAs at the Naval Air Systems Command

(NAVAIR) and attempt to identify actions which can be taken to reduce the number of contract claims and REAs and the resulting costs to the Government.

C. SCOPE

The scope of this thesis includes: (1) a review of contract claim procedures, (2) a categorization of underlying cause(s) of the contract claims and REAs submitted to NAVAIR from January 1997 through December 1998, (3) an in-depth analysis of the underlying cause(s) of the contract claims and REAs in each category, and (4) an evaluation of alternatives which could address the underlying causes of the contract claims and REAs. The thesis concludes with a series of recommendations for NAVAIR which could lead to reduced numbers of contract claims and REAs.

D. LITERATURE REVIEW AND METHODOLOGY

The literature review included the Naval Postgraduate School's (NPS) theses and acquisition libraries, a search of internet resources and the Defense Acquisition Deskbook. Magazine articles, text books and legal files were reviewed to gather background information and issues. To structure research for the thesis, the following research questions were developed:

1. Primary Research Question

What is NAVAIR's experience with contract claims and REAs and how might they change their business practices to reduce the number of claims and REAs submitted?

2. Secondary Research Questions

(1) How can the claims be categorized according to cause?

(2) Which claims categories cause the largest individual and aggregate contingent liabilities?

(3) Which claims categories tend to be the most successful in terms of settlement amount as compared to the original claim value?

(4) How many of the claims in each category could potentially have been prevented and how might they have been mitigated or prevented?

(5) Which categories offer the most opportunity for improvements?

(6) What specific actions should be taken to reduce the quantity and size of claims for each category?

E. ASSUMPTIONS AND LIMITATIONS

In July 1997, NAVAIR moved from Arlington, Virginia to Patuxent River Naval Air Station in Lexington Park, Maryland. As a result of the move, a large number of civilian employees of NAVAIR were resigned. In some areas, attrition was as high as 30%. This caused a significant

loss of corporate knowledge and continuity. In cases where the contracting officers had left NAVAIR, it was virtually impossible to track them down for interviews. [Ref. 1] Therefore, the researcher had to rely on contract documentation for background information which made accurate categorization of claims more difficult.

F. DEFINITIONS

Claim: The Federal Circuit Court's July 1995 decision in Reflectone, Inc. v. Dalton held that a REA no longer requires a preexisting dispute to be cognizable as a claim. Instead a claim must only be a written demand seeking, as a matter of right, a sum certain under a Federal contract. Furthermore, undisputed, routine requests for payment are not considered claims. [Ref. 2 p.2] Given the lack of distinction between claims and REAs, for the purposes of this analysis, all claims and REAs will be generically referred to as claims.

The following categories have been used to categorize the claims submitted to NAVAIR from January 1997 through December 1998.

Constructive Changes: Constructive changes are increases in the work performed by the contractor which were not initiated by a formal contract change. These can happen when the contractor is given guidance on how to execute the program which the contractor perceives to be an increase in

the work of the contract. This guidance can be given by the program office or by the overseeing Defense Contract Management Command (DCMC) office. These claims can also arise when the Government changes the requirements of the contract without, in the contractor's opinion, adequately compensating the contractor. This compensation can be monetary or it can take other forms such as schedule relief. Several of the other categories of claims used here such as Government Furnished Equipment/Property (GFE/GFP), Government action and specifications, are typically classified as constructive changes, [Ref. 3 p.233] but have been further subdivided for the purposes of this analysis.

Government Furnished Equipment/Property (GFE/GFP): GFE/GFP is material provided by the Government that the contractor needs to produce the product. This material can range from raw materials to aircraft engines. Frequently, GFE/GFP is provided as a result of the efforts by another contractor, i.e. an aircraft engine manufacturer. Claims in this category primarily occur when GFE/GFP is received late or is defective. Both of these conditions can result in schedule delays and cost increases.

Government Action: Government actions such as issuing a Stop Work Order (SWO) can result in significant delay and disruption to a program. Government actions causing claims can also include delays in Government acceptance testing or increased unit costs due to reductions in the quantity being

procured. This category also covers areas where the Government has failed to uphold its responsibilities under the contract such as providing the contractor with access to facilities or by failing to purchase specified quantities under requirements contracts.

Protest: Contract award protests occur when there has been a perceived lack of fairness in the source selection process. Contract award protests generally require the Government to issue a stop work order resulting in a claim from the contractor who won the award. These have been broken out as separate from the Government action category. Claims in this category can also arise from protest related costs.

Specifications: Specifications detail exactly what is to be produced, how it is going to be produced and what the end item should be capable of doing. Clarity in the writing of specifications is essential to eliminate misunderstandings or disagreements on the meaning of the specifications because the contractor's proposal and cost assumptions will be based on their interpretation of the specifications in the Request for Proposal (RFP). Claims arise when the program is being executed and a difference in opinion over the interpretation of the specification develops between the Government and the contractor. Claims can also arise when the Government provides defective specifications and the contractor is required to expend

additional effort to correct the problems with the specifications. In some cases, the contractor has already expended effort trying to perform according to the defective specification and must expend additional effort as a result of an amended specification. This category includes claims where there were misunderstandings or disagreement on the interpretation of the specifications, defective specifications and those where the Government has changed the specification and the new specification has caused other problems.

Termination for Convenience of the Government/Default (T4C/T4D): Governmental authority to terminate a contract for its convenience is based on its sovereign powers to safeguard public funds and protect the best interests of the Government. [Ref. 3 p.273] Termination for default occurs when the contractor has defaulted on the contract and the Government elects to terminate the contract in whole or in part. When either of these situations occur, a claim can result from the contractor requesting termination costs they feel were not adequately compensated for in the termination action.

Terms and Conditions: The terms and conditions of the contract specify the framework of the agreement between the Government and the contractor. They assign and detail responsibilities associated with the performance of the contract. Terms and conditions provide for contingencies

and assign responsibility for various actions in the event one or more of those contingencies arises. Contractors base their proposals on their interpretation of the terms and conditions detailed in the RFP. Claims arise when the Government's interpretations of the terms and conditions differ from those of the contractor resulting in additional costs to the contractor.

G. ORGANIZATION OF STUDY

Chapter I serves as a basic introduction to the thesis.

Chapter II discusses the regulations governing the submission of claims and how their interpretation has been shaped by a subsequent decision by the U.S. Court of Appeals for the Federal Circuit. The chapter concludes with a discussion of recent literature dealing with the avoidance of claims.

Chapter III provides background on the NAVAIR organization, NAVAIR's experience with claims and their internal procedures for handling claims.

Chapter IV describes the methodology used to categorize and analyze the data.

Chapter V presents the claims broken down into the respective categories for the Headquarters and each field activity.

Chapter VI provides the analysis of the data presented in Chapter V.

Chapter VII provides conclusions, recommendations, answers to the research questions and areas for further research.

II. LITERATURE REVIEW AND THEORETICAL FRAMEWORK

A. INTRODUCTION

This chapter first provides an introduction to the regulatory background guiding the handling of contract disputes. It then goes on to discuss the current procedures contractors use when disputes arise which may result in litigation and legal decisions which have affected those procedures. The chapter concludes with a discussion of literature dealing with contract claim avoidance.

B. BACKGROUND

Following the end of the cold war, the defense budget was significantly reduced. This budgetary pressure has forced a renewed emphasis on cost containment. One outgrowth of this has been decreased tolerance of cost growth on Government contracts. Unfortunately, when the Government enters large, complex contracts for the purchase of goods and services, disagreements will inevitably arise. Settlement of these disagreements frequently results in additional costs to the Government.

The handling of contract disputes arising under contracts between the Federal Government and a contractor are principally governed by the Contract Disputes Act (CDA) of 1978. The CDA replaced a patchwork of overlapping and

confusing laws and rules governing the disputes process with a comprehensive law that affects every stage of a Government contract dispute, from the first communication with the Contracting Officer to the final decision on appeal. [Ref. 4 p.3-3]

The coverage of the CDA, in accordance with 41 U.S.C. § 605 extends to all disputes "relating to the contract" and states:

All claims by a contractor against the Government relating to a contract shall be in writing and shall be submitted to a contracting officer for a decision. All claims by the Government against a contractor shall be the decision of the contracting officer... [Ref. 5 p.1244]

For several years under the CDA, despite improvements over previous systems, the process of submitting claims was extremely complex. In fact, boards and courts have dismissed appeals because the contractors had not met every "claim" requirement before submitting it to the contracting officer. A particularly difficult requirement was that there be a preexisting dispute prior to the claim submission. In effect, this required contractors to submit claims twice: first to try to create a dispute, and second to request a final decision. [Ref. 6 p.13]

This all changed when the U.S. Court of Appeals for the Federal circuit held in *Reflectone, Inc. v. Dalton* that demands for payment under the CDA need not be "in dispute"

when submitted unless they are vouchers, invoices or other routine payment requests. [Ref. 6 p.13]

The *Reflectone, Inc. v. Dalton* holding was based on the FAR definition of a "claim" which sets forth only three requirements for a non-routine claim for money, that it be, (1) a written demand, (2) seeking as a matter of right, (3) the payment of a sum certain. [Ref. 6 p.14]

Although the *Reflectone* decision simplified the process significantly, eight CDA requirements remain in effect. In order to be a claim, the request must: (1) be in writing, (2) request a final decision by the contracting officer, (3) seek payment as a "matter of right", (4) seek a sum certain, (5) be made with sufficient specificity, (6) be certified, (7) be submitted to the contracting officer, and (8) be "non-routine" or be in dispute. [Ref. 6 p.14]

Contractors and the Government do not necessarily cease talking to one another because they disagree on the merits of a claim. In fact, the continuation of negotiations benefits both parties and is in keeping with the spirit of the CDA. [Ref. 5 p.1262] If at any point in the process, agreement is reached by negotiations, the claims process simply stops.

Contract claims result in increased costs to both the contractor and the Government such as claim preparation costs, litigation costs and interest costs in the case of a

legal ruling against the Government. Furthermore, they can distract managers from completing their primary mission. For those reasons, it would be useful to identify situations which have the potential for developing into claims and resolve them early.

C. CURRENT CLAIMS LITERATURE

There is a great deal of literature devoted to handling a claim once it has developed, but the literature which specifically addresses the prevention of claims is extremely limited. In response to significant shipbuilding claims experienced during the 1970s the Naval Sea Systems Command (NAVSEA) published a Handbook for Claims Avoidance. Although this publication is somewhat dated, many of its recommendations are still applicable.

The NAVSEA Handbook focuses on three areas which are still germane to the discussion of claims avoidance. They are, the pre-contract review, the Post Award Orientation Conference and documentation of significant events.

Pre-Contract Review: The NAVSEA Handbook emphasizes eliminating ambiguities from the start by writing clear contract clauses and specifications. Ambiguities should be addressed and resolved early in the process before they complicate contract performance. The Handbook also advocates the early use of contract administration agencies such as the Defense Contract Management Command (DCMC) to

help identify potential problem areas. A clear theme that emerges from the Handbook's discussion of the pre-contract review process is that clear and open communication is critical to this process. [Ref. 7 p.14]

Post-Award Orientation Conference (PAOC): The PAOC is an important forum for addressing contract ambiguities and potential problem areas. The Handbook establishes three goals for the PAOC. They are: (1) establish lines of communication, (2) identify responsibility, and (3) identify potential problem areas. [Ref. 7 p.15]

Documentation of significant events: During contract performance, issues may arise which could develop into a claim if not addressed and resolved in a timely manner. The Handbook discusses the importance of documenting all significant contract events and the importance of rapidly reporting potential issues to the Program Manager. It goes on to recommend that personnel in a decision making capacity should maintain a personal claims notebook to aid their memories. Major themes of this discussion centered around protecting the Government's position by documenting significant events and developing feedback mechanisms to quickly inform the Program Manager and the Contracting Officer of potential issues. [Ref. 7 p.18]

A June 1996 article in Contract Management magazine was entitled "Claims Avoidance: Advice from the Pit". In this article, Richard Porterfield begins his discussion by

observing that "good contract management is being able to avoid claims and disputes to begin with." [Ref. 8 p.25]

Porterfield identifies seven areas of focus when attempting to head off claims. They are: (1) write a clear work description, (2) choose the right contract type, (3) select appropriate award criteria, (4) write a good contract, (5) define respective responsibilities, authority, and limits, (6) know your rights, and (7) document all significant contract actions. [Ref. 8 pp.26-27]

Porterfield echoes the themes used in the NAVSEA Handbook with discussions about writing clearly stated requirements and clauses, establishing who has authority to change the contract, and documenting significant contract events. In addition, he brings in a few new themes. His discussion of contract type selection includes a list of signs that a fixed price contract is not appropriate for your procurement. The logic is that if the contractor is forced to assume too much risk under a fixed price contract, the likelihood of claims is much greater. Porterfield also brings past performance information into the discussion about making the award decision. Certainly, if a contract is awarded to a contractor who has had performance problems on similar contracts in the past, the risk of claims is increased. The final new theme Porterfield brings out involves the knowledge level of the Government contracting personnel. He cites several potential scenarios where

contractors submit valid REAs in response to Government delays or stop work orders which are then denied because the Government contracting personnel were not aware these were valid bases for REAs. [Ref. 8 p.29]

Both publications dealing with claims avoidance suggest that good basic contracting practices and solid contract administration have the potential to reduce contract claims submitted to the Government. Both recognize that a major acquisition program is a complex undertaking which requires coordinating the efforts of a large number of people and simultaneously monitoring a large number of geographically dispersed activities. Because of these inherent difficulties in managing a major acquisition program, basic systems using free and open communication to highlight potential problems and resolve them quickly need to be put in place.

D. SUMMARY

The legal and regulatory environments for claims are complex and have been the subject of a great deal of literature. Current literature dealing with the prevention of claims is very limited, but offers some good suggestions which appear to have potential for preventing claims. The next chapter provides background on the Naval Air Systems Command, their past experience with claims and their internal procedures for handling claims.

III. BACKGROUND

A. NAVAL AIR SYSTEMS COMMAND (NAVAIR):

NAVAIR, based at Patuxent River Naval Air Station, is responsible for working with industry and other Government agencies to develop, test, deliver, and support products and provide related services throughout the weapon system's life cycle. These products include:

Carrier and other air capable ship based aircraft and systems.

Integrated air anti-submarine warfare/anti-surface warfare mission systems.

Marine expeditionary forces aviation systems.

Maritime air launched and strike weapons.

Training systems for aircrew and maintenance personnel.

In 1998, NAVAIR managed over 140 acquisition programs worth 16.4 billion dollars. In addition to the headquarters operation, NAVAIR oversees 10 major technology and engineering centers, test and evaluation facilities, depots and logistics support activities nationwide. [Ref. 9]

In addition to contracting activities conducted at the NAVAIR headquarters, NAVAIR has three subordinate commands with contracting authority. These are:

Naval Air Warfare Center, Aircraft Division

Naval Air Warfare Center, Weapons Division

Naval Air Warfare Center, Training Systems Division

**1. Naval Air Warfare Center, Aircraft Division
(NAWC-AD):**

NAWC-AD operates aircraft test and evaluation sites at Patuxent River, Maryland; Lakehurst, New Jersey; Key West, Florida; and Orlando, Florida. The majority of contract actions initiated by NAWC-AD are for research, development, test and evaluation and support services related to aircraft systems and base support. [Ref. 10]

2. Naval Air Warfare Center, Weapons Division (NAWC-WD):

NAWC-WD operates the Naval Weapons Center in China Lake, California; the Pacific Missile Test Center at Point Magu, Hawaii; the Naval Weapons Evaluation Facility at Albuquerque, New Mexico; and the Naval Ordnance Missile Test Station at White Sands, New Mexico. The majority of contract actions initiated by NAWC-WD are for research, development, test and evaluation and support services related to aircraft weapons and base support. [Ref. 11]

**3. Naval Air Warfare Center, Training Systems
Division (NAWC-TSD):**

NACW-TSD is located in Orlando, Florida and is responsible for developing and maintaining training systems in support of naval aviation systems. The majority of

contract actions initiated by NAWC-TSD are for research, development, test and evaluation and support services related to aircraft training systems. [Ref. 12]

B. NAVAIR CLAIMS EXPERIENCE

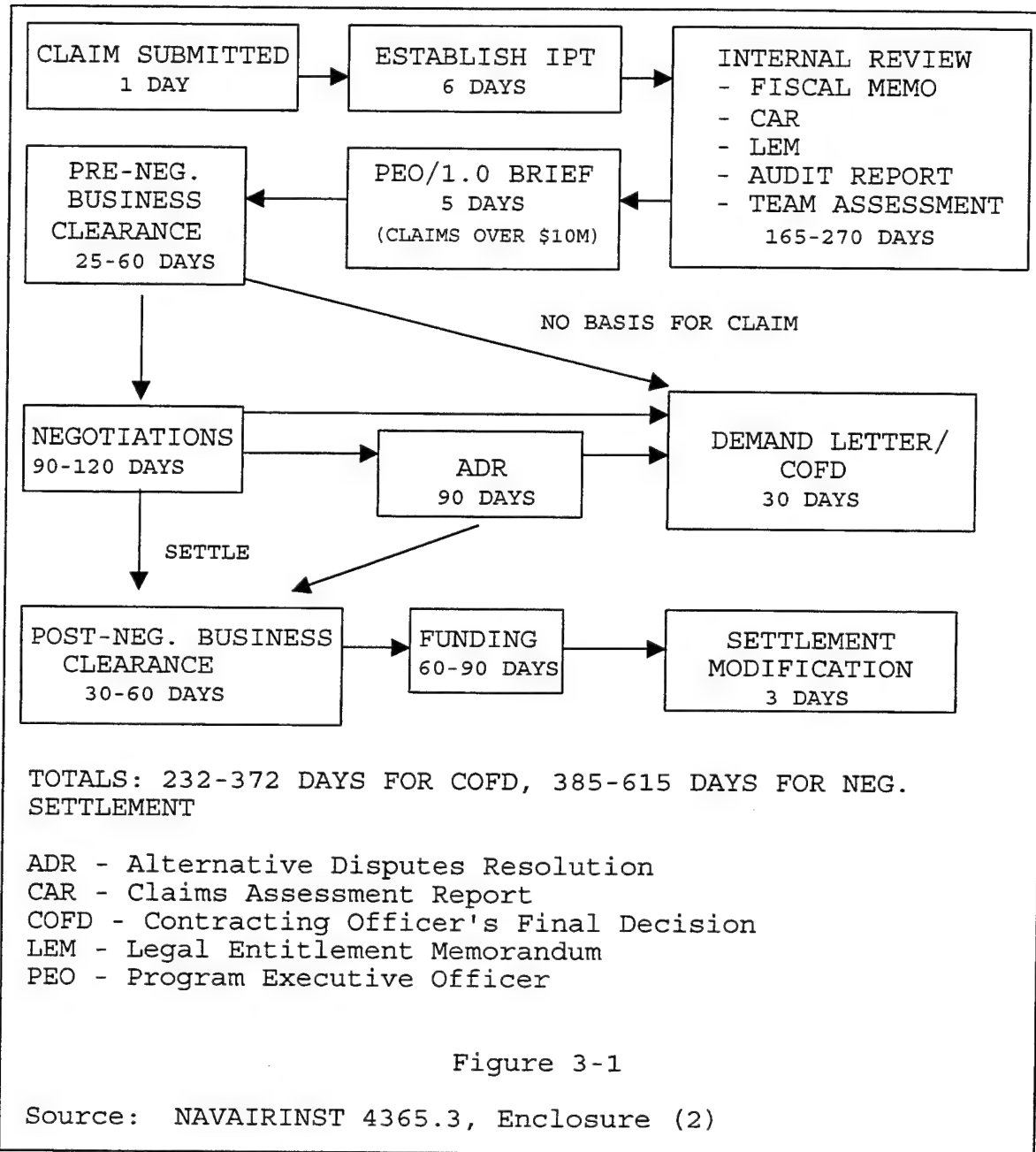
In 1996, NAVAIR had over 100 active claims and no central point to coordinate the claims resolution process. This led to the establishment of the Center of Excellence for Claims, AIR 2.5.1. In January 1997, all outstanding claims were serialized to facilitate tracking and a claims database was established. Prior to 1997, little data regarding claims was kept in a format which facilitated tracking or analysis. Since the establishment of AIR 2.5.1, the backlog of claims has been dramatically reduced. NAVAIR management is now focusing on how to prevent the generation of claims which has prompted this study.

C. NAVAIR CLAIMS PROCEDURES

NAVAIR Instruction 4365.3 Processing and Reporting of Claims and Requests for Equitable Adjustment, governs NAVAIR's claims handling and reporting process.

Claims received at NAVAIR Headquarters are forwarded to the NAVAIR Center of Excellence for Claims at AIR 2.5.1 via the cognizant contracts department head unless that department head decides to handle the claim within his own department. Claims received at the NAWCs are handled by the

warfare center's contracting division. Once any claim is received, an Initial Report of Contractor Claim, see Appendix A, is prepared and forwarded to AIR 2.5.1.



AIR 2.5.1 prepares a monthly report on the status of outstanding claims which is submitted to the Commander of NAVAIR. [Ref. 2, p.2]

Figure 3-1 diagrams the NAVAIR claims resolution process. Following submission of a claim, the Program Manager or equivalent person with the authority to commit resources to the claim forms an Integrated Product Team (IPT). [Ref. 2 Encl 3, p.2]

The Contracting Officer is responsible for establishing a schedule for processing the claim and for notifying the contractor of this schedule. [Ref. 2 Encl 3, p.2]

After verifying that the claim is complete, the IPT will perform an initial review of the claim. This initial review includes a preliminary assessment of the merits of the claim and the legal theories involved. [Ref. 2 Encl 3, p.2]

If appropriate, fact-finding will be conducted to clarify the contractor's claim or to gather facts regarding the claim. After fact-finding is completed, the IPT will prepare a Fiscal Memorandum, a Claims Analysis Report (CAR) and a Legal Entitlements Memorandum (LEM) to document the Government's position. [Ref. 2 Encl 3, p.3] The Fiscal Memorandum provides a preliminary assessment of the appropriations and years of funds which will be required if the claim is settled. The CAR discusses the facts and analyzes technical, contractual, accounting, and

programmatic issues raised in the claim. The LEM addresses the legal merits of the claim, including a preliminary assessment of likely outcomes if the claim is taken to court. [Ref. 2 Encl (1), p.2] Finally, the Defense Contract Audit Agency (DCAA) will audit all claims exceeding \$500,000 unless the audit is waived by the contracting officer. [Ref. 13]

Once the fiscal memorandum, CAR, LEM and audit report are completed, the IPT reviews the documents and discusses alternatives with the contracting officer. These alternatives include: proceeding with negotiation, pursuing Alternative Disputes Resolution (ADR) or issuing a Contracting Officer's Final Decision (COFD). The contracting officer will make the ultimate decision on the course of action to be taken. The results of the recommendation are then formalized in a written memorandum called a Team Assessment. [Ref. 2 Encl 3, p.4]

Prior to entering negotiations, the PCO will prepare a pre-negotiation business clearance detailing the Government's position. In the event that there is no negotiated or ADR settlement, the CO will prepare a COFD letter stating the final position of the Government and that no agreement with the contractor has been reached. [Ref. 2 Encl 3, p.7]

In the event of an undue delay by the CO in rendering a decision on the claim, the contractor may request the Armed

Services Board of Contract Appeals (ASBCA) or the Court of Federal Claims to deem the CO's inaction as a denial of the claim in its entirety. If the ASBCA or Court of Federal Claims accepts the contractor's assertions, litigation begins without a COFD. [Ref. 2 encl. 3, p.8]

D. SUMMARY

NAVAIR is a large enterprise with a diverse set of activities operating simultaneously. In a decentralized activity like NAVAIR which manages complex contracts, disagreements will inevitably arise which may result in claims. These claims have been a problem for NAVAIR in the past, but significant advances in claims handling and resolution have been made since 1997. These advances have been attributed to the adoption of a Center of Excellence for Claims and the establishment of formal claims processing procedures. The next phase in NAVAIR's approach to addressing contract claims problems is to attempt to prevent their generation. The next chapter, will describe the methodology used to analyze NAVAIR's claims database.

IV. METHODOLOGY

Information on claims was obtained from the AIR 2.5.1 claims database. Descriptions of issues as well as answers to follow-up questions were provided by the cognizant contracting officers. Because of the significant personnel turnover which occurred when NAVAIR moved from Arlington, Virginia to the Patuxent River Naval Air Station in Maryland, some contracting officers could not be reached for follow-up interviews. In those cases, documents from the central files at NAVAIR were examined.

First, all claims were segregated by contracting activity. For each contracting activity, claims were then categorized according to the underlying point(s) of disagreement between the Government and the contractor. In some cases, a claim was based on a number of assertions by the contractor which caused it to qualify under multiple claim categories. In these cases, an attempt was made to determine if one of the issues was the predominant basis of the claim. If one issue was judged to be the predominant basis for the claim and the other assertions were insignificant in comparison, the claim was categorized based on the main assertion. For the vast majority of the claims with multiple bases, the secondary issues were judged to be significant enough to merit analysis. In those cases, the claims were counted in multiple categories.

Once the claims had been categorized for each activity, the claims were analyzed to identify those which generated the most claims for the activity as measured by number of claims and by claim dollar value.

Significant claims categories from each activity were then analyzed in detail to look for trends and to assess the degree to which those trends could have been prevented. Once trends were identified, an attempt was made to determine what steps in the contracting process could have prevented the claims from having been generated. Conclusions, recommendations and answers to the research questions will be developed based on this analysis.

In this chapter, the framework for the data collection and analysis is laid out. The following chapter provides a summary of the data collected.

V. PRESENTATION OF DATA COLLECTED

A. INTRODUCTION

This chapter presents claims data collected from the NAVAIR 2.5.1 claims database. First summary data for all NAVAIR activities are presented, then the data are segregated by activity and further subdivided according to causes of the claims.

B. ALL NAVAIR CLAIMS

From January 1997 to December 1998, NAVAIR had 96 active claims totaling \$656,364,972. Of these claims, 59 were submitted prior to January 1997, but had not yet been settled. Figure 5-1 shows total claims figures by activity.

	Claims Dollar Value	Number of Claims
Headquarters	\$542,805,843	31
NAWC-AD	\$20,327,934	20
NAWC-WD	\$17,553,936	23
NAWC-TSD	\$75,677,259	22
	<hr/> \$656,364,972	<hr/> 96

Figure 5-1

Source: Developed by researcher

C. NAVAIR HEADQUARTERS CLAIMS

NAVAIR Headquarters had a total of 31 claims representing a value of \$542,805,843. Of these claims, 17 have been settled and two were withdrawn. Figure 5-2 shows the breakdown of the NAVAIR Headquarters claims by cause. The total count appears overstated because five claims were classified as having multiple causes. On these claims, costs could not be segregated by cause which resulted in their being double counted in the total dollar value. Consequently, the total dollar value is overstated by \$9,127,581.

NAVAIR Headquarters Claims

	Total Claims	Number	Average	Amount Withdrawn
Constructive Changes	\$79,630,567	8	\$9,953,821	\$0
GFE/GFP	\$18,226,343	7	\$2,603,763	\$0
Government Action	\$405,793,449	9	\$45,088,161	\$2,299,752
Protest	\$0	0		\$0
Specifications	\$27,731,391	9	\$3,081,266	\$2,153,073
T4D/T4C	\$2,445,674	1	\$2,445,674	\$0
Terms and Conditions	\$18,106,000	2	\$9,053,000	\$0
	\$551,933,424*	36+	\$15,331,484	\$4,452,825

* Includes five claims double counted for multiple causes. Total overstated by \$9,127,581.

+ Includes five claims with multiple causes.

Figure 5-2

Source: Developed by researcher

Of these claims, 17 have been settled to date. Figure 5-3 shows NAVAIR Headquarters' experience with settled claims broken down by cause.

NAVAIR Headquarters Settled Claims Experience

	Original Value	Settled Value	Settlement Rate	Number Settled
Constructive Changes	\$24,202,773	\$10,637,408	44.0%	4
GFE/GFP	\$11,759,556	\$5,288,558	45.0%	4
Government Action	\$391,699,978	\$150,711,052	38.5%	3
Protest	\$0	\$0		0
Specifications	\$12,036,991	\$7,581,052	63.0%	6
T4D/T4C	\$2,445,674	\$1,685,659	68.9%	1
Terms and Conditions	\$0	\$0		0
	<u>\$442,144,972*</u>	<u>\$175,903,729+</u>	39.8%	<u>18++</u>

* Includes one claim double counted for multiple causes. Total overstated by \$1,300,000.

+ Includes one claim double counted for multiple causes. Total overstated by \$711,052.

++ Includes one claim with multiple causes. Total overstated by one.

Figure 5-3

Source: Developed by researcher

D. NAWC-AD CLAIMS

NAWC-AD had a total of 20 claims representing a value of \$20,327,934. Of these claims, 12 have been settled and three were withdrawn. Figure 5-4 shows the breakdown of the NAWC-AD claims by cause. The total count appears overstated because two claims were classified as having multiple causes. Costs could not be segregated by cause for these claims which resulted in their being double counted in the total dollar value. As a result, the total dollar value is overstated by \$2,361,744.

NAWC-AD Claims				
	Total Claims	Number	Average	Amount Withdrawn
Constructive Changes	\$1,610,330	2	\$805,165	\$0
GFE/GFP	\$0	0		\$0
Government Action	\$2,609,370	4	\$652,343	\$58,421
Protest	\$1,022,795	2	\$511,398	\$879,000
Specifications	\$10,082,720	7	\$1,440,389	\$0
T4D/T4C	\$4,274,919	2	\$2,137,460	\$0
Terms and Conditions	\$3,089,544	5	\$617,909	\$87,000
	\$22,689,678*	22+	\$1,031,349	\$1,024,421

* Includes two claims double counted for multiple causes.
Total overstated by \$2,361,744.
+ Includes two claims with multiple causes.

Figure 5-4

Source: Developed by researcher

Of these claims, 12 have been settled to date. Figure 5-5 shows NAWC-AD's experience with settled claims broken down by cause.

NAWC-AD Settled Claims Experience

	Original Value	Settled Value	Settlement Rate	Number Settled
Constructive Changes	\$158,586	\$29,043	18.3%	1
GFE/GFP	\$0	\$0	N/A	0
Government Action	\$1,102,150	\$431,000	39.1%	2
Protest	\$143,795	\$80,206	55.8%	1
Specifications	\$8,630,976	\$4,787,601	55.5%	6
T4D/T4C	\$4,155,982	\$1,000,000	24.1%	1
Terms and Conditions	\$118,552	\$104,725	88.3%	2
	<u>\$14,310,041*</u>	<u>\$6,432,575+</u>	45.0%	<u>13++</u>

* Includes one claim double counted for multiple causes. Total overstated by \$910,000.

+ Includes one claim double counted for multiple causes. Total overstated by \$346,000

++ Includes one claim with multiple causes. Total overstated by one.

Figure 5-5

Source: Developed by researcher

E. NAWC-WD CLAIMS

NAWC-WD had a total of 23 claims representing a value of \$17,553,936. Of these claims, 9 have been settled and one was withdrawn. Figure 5-6 shows the breakdown of the NAWC-WD claims by cause.

NAWC-WD Claims				
	Total Claims	Number	Average	Amount Withdrawn
Constructive Changes	\$1,136,987	4	\$284,247	\$0
GFE/GFP	\$0	0		\$0
Government Action	\$2,046,976	4	\$511,744	\$0
Protest	\$0	0		\$0
Specifications	\$0	0		\$0
T4D/T4C	\$1,783,501	2	\$891,751	\$0
Terms and Conditions	\$12,586,472	13	\$968,190	\$100,011
	<hr/> \$17,553,936	<hr/> 23	<hr/> \$763,215	<hr/> \$100,011

Figure 5-6

Source: Developed by researcher

Of these claims, 9 have been settled to date. Figure 5-7 shows NAWC-WD's experience with settled claims broken down by cause.

NAWC-WD Settled Claims Experience

	Original Value	Settled Value	Settlement Rate	Number Settled
Constructive Changes	\$1,136,987	\$661,796	58.2%	4
GFE/GFP	\$0	\$0		0
Government Action	\$928,596	\$103,311	11.1%	2
Protest	\$0	\$0		0
Specifications	\$0	\$0		0
T4D/T4C	\$0	\$0		0
Terms and Conditions	\$5,041,678	\$4,554,432	90.3%	3
	<hr/> \$7,107,261	<hr/> \$5,319,539	74.8%	<hr/> 9

Figure 5-7

Source: Developed by researcher

F. NAWC-TSD CLAIMS

NAWC-TSD had a total of 22 claims representing a value of \$75,677,259. Of these claims, 10 have been settled and five were withdrawn. Figure 5-8 shows the breakdown of the NAWC-TSD claims by cause.

Of these claims, 10 have been settled to date. Figure 5-9 shows NAWC-TSD's experience with settled claims broken down by cause.

NAWC-TSD Claims

	Total Claims	Number	Average	Amount Withdrawn
Constructive Changes	\$7,569,959	4	\$1,892,490	\$1,348,905
GFE/GFP	\$16,299,163	7	\$2,328,452	\$899,270
Government Action	\$886,351	1	\$886,351	\$0
Protest	\$383,163	2	\$191,582	\$0
Specifications	\$43,419,874	3	\$14,473,291	\$0
T4D/T4C	\$1,700,000	1	\$1,700,000	\$0
Terms and Conditions	\$5,418,749	4	\$1,354,687	\$1,333,262
	<hr/> \$75,677,259	<hr/> 22	<hr/> \$3,439,875	<hr/> \$3,581,437

Figure 5-8

Source: Developed by researcher

NAWC-TSD Settled Claims Experience

	Original Value	Settled Value	Settlement Rate	Number Settled
Constructive Changes	\$6,221,054	\$3,535,000	56.8%	2
GFE/GFP	\$498,574	\$385,277	77.3%	2
Government Action	\$0	\$0		0
Protest	\$34,513	\$3,537	10.2%	1
Specifications	\$31,592,259	\$12,217,308	38.7%	2
T4D/T4C	\$1,700,000	\$2,000,000	117.6%	1
Terms and Conditions	\$601,023	-\$50,000	-8.3%	2
	<hr/> \$40,604,083	<hr/> \$18,091,122	<hr/> 44.6%	<hr/> 10

Figure 5-9

Source: Developed by researcher

G. SUMMARY

This chapter summarizes the claims data collected by NAVAIR 2.5.1 between January 1997 and December 1998. The data have been segregated by activity and further subdivided to show the distribution of claims according to the causes identified in Chapter One. The following chapter provides an analysis of these data and attempts to identify trends.

VI. DATA ANALYSIS/INTERPRETATION

A. INTRODUCTION

This chapter presents an analysis of each category of claims submitted to the various NAVAIR activities.

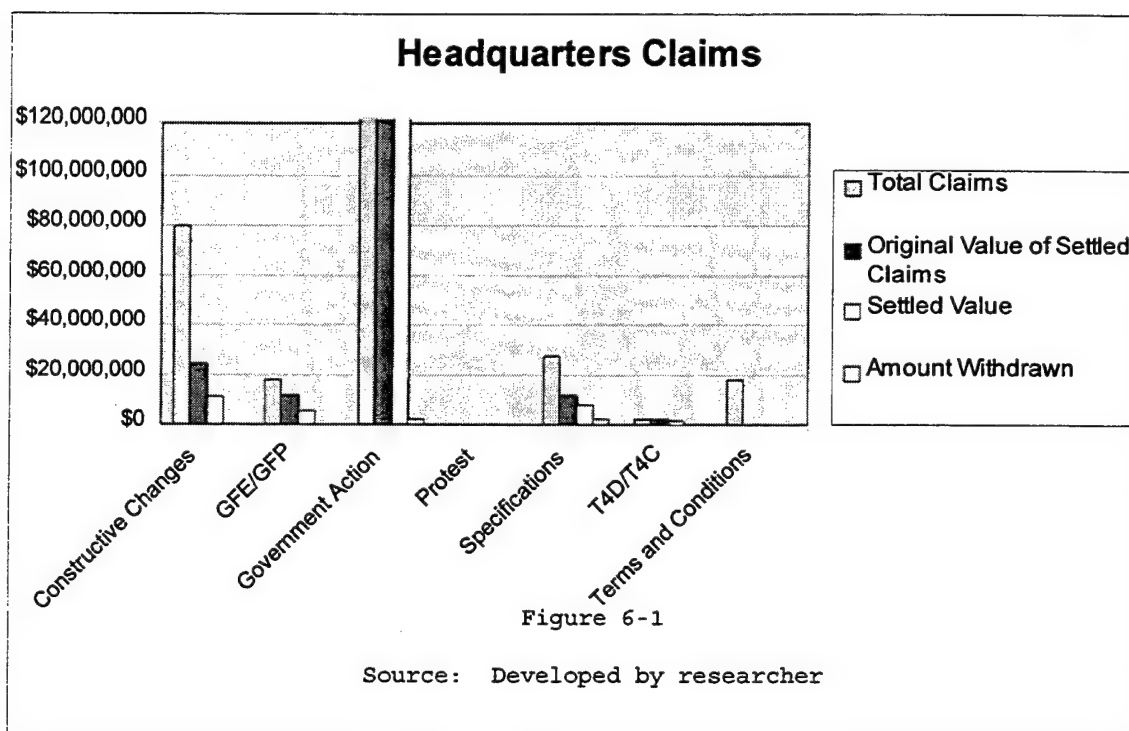
B. NAVAIR HEADQUARTERS

With 31 claims submitted totaling \$542.8M, NAVAIR headquarters accounted for the largest number of claims and represented the vast majority of the dollar value of all claims. This is not surprising as the Headquarters accounts for 7.8% of all contract actions and 79.6% of all dollars awarded. This figure is inflated by one claim for \$390M, but still overshadows the other activities if that claim is excluded.

Figure 6-1 shows the distribution of claims at NAVAIR Headquarters broken down by cause. Government Actions (\$405.8M) and Constructive Changes (\$79.6M) were the largest categories but Specifications (\$27.7M), GFE/GFP (\$18.2M), and Terms and Conditions (\$18.1M) were significant enough to also merit close examination.

Government Actions represented the highest average claim value at \$45.1M, but this figure is inflated by the \$390M claim. Excluding the effects of that claim yields an average claim value of \$1,974K for the remaining claims.

The average for Terms and Conditions is similarly distorted by a \$16.8M claim and the average for Constructive Changes is distorted by a \$48.0M claim. Terms and Conditions only had two claims, the second of which was for \$1.4M. Excluding the \$48.0M claim from Constructive Changes yields an average of \$4,519K for the remaining claims.



After making these adjustments, Constructive Changes still represents the highest average claim value at \$4.5M. This is followed, in order of claim size, by Specifications (\$\$3.1M), GFE/GFP (\$2.6M), T4C/T4D (\$2.4M), and Government Actions (\$2.0M). The following is an evaluation of each category. 17 of the NAVAIR Headquarters claims were settled

at an average settlement rate of 39.8% of the original claim value.

1. Government Actions (\$405.8M)

NAVAIR Headquarters received nine claims based on Government Actions totaling \$405,793,449. The claims ranged in value from \$390M to \$400K. The claims for this category are detailed in Appendix B. The most significant claim in this category is from an aircraft engine manufacturer for a total of \$390M. The engine manufacturer asserted that the Government failed to adhere to a contract provision guaranteeing them a percentage of all NAVAIR procurements of a particular engine design and all follow-on engines. The ASBCA ruled that the Government had breached the Investment Incentive Clause and awarded the engine manufacturer \$150M. All of the remaining claims in this category, except one, were based on assertions that the Government had failed to fulfill one or more contractual terms, or that the Government had caused delays through late testing.

It is important for the Government to fulfill its responsibilities under a contract. Contracting Officers should ensure these responsibilities are clearly spelled out in the contract and fully understood by program office personnel. Any delays in testing must be addressed up front and their impacts firmly established. Two of the claims were based on less concrete assertions such as failure to

cooperate with the contractor are harder to tie to contractual provisions. These claims may stem from a degradation of the relationship between the Government and the contractor. Program offices should be aware of the potential impacts of an adversarial relationship with the contractor. The potential for claims such as these also increases when the contractor appears to be experiencing financial problems and is looking to increase their profitability on this contract through claims.

A broad generalization of this category might be that the events which spurred these claims were not originally intended. Government personnel need to understand the extent to which their action, or inaction, can influence the execution of the contract. They also need to be fully aware of their responsibilities. The most recent revision to the DoD 5000 series regulation emphasizes cooperative teaming arrangements between the contractor and the Government through the use of the Integrated Product and Process Development (IPPD) process and Integrated Product Teams (IPTs). These types of teaming arrangements can foster a cooperative environment which allows potential problems to be identified, addressed, potential impacts evaluated, and mutually agreed upon solutions to be developed.

Settlement experience was limited to two claims which were settled for 38.5% and 54.7% of the original claim values. This is not enough data to draw any conclusions

about expected settlement rates for the remainder of the claims in this category.

2. Constructive Changes (\$79.6M)

NAVAIR Headquarters received eight claims based on constructive changes totaling \$79,630,567. The claims ranged in dollar value from \$48.0M to \$600K. These claims are detailed in Appendix C. If most of the Government Actions claims were unintended consequences, the Constructive Changes claims might be characterized as intended. The work completed, which underlies most of these claims, was not only wanted, but was ordered by Government personnel. The claims arose because the changes were not properly implemented in the contract. Contractors asserted that the change increased the scope and costs of performance, while the Government asserted that the change did not expand the scope of the work.

Two of the claims asserting changes in inspection practices were based on changes made by the Defense Contract Management Command (DCMC) at a subcontractor facility. These changes were coordinated with the program office, but were not addressed contractually with the prime contractor. Consequently, the claims were submitted. In claim 97-15HQ, \$11.4M , new inspections were added following the explosion of a rocket motor, but again, were not contractually addressed. All of the other claims in this category arose

because someone from the Government directed a change to the work under the contract without generating a contract modification to implement it.

The only person authorized to change a contract is the Contracting Officer. Contractors are responsible for establishing the authority of the person ordering the change before accepting the change. [Ref. 14] Despite the fact that the burden of establishing authority lies with the contractor, Government personnel understand the extent of their authority to order only authorized changes to the contract. The majority of these claims arose when working level personnel attempted to "clarify" gray areas for the contractor. The breakdown in the process occurred when they failed to consider the contractual implications of the guidance they provided.

Legally, the Government may be bound only by employees with actual authority [Ref. 15] and therefore, may not be obligated to compensate a contractor for work performed under unauthorized changes. However, the work performed under these changes is generally desired and in the best interests of the Government. Because of this and the fact that past litigation has resulted in the courts making awards awards to the contractor where implied authority was found to be a reasonable assumption by the contractor [Ref. 15], the Government will elect to try and negotiate a settlement. This is an undesirable situation because the

direction given may not be consistent with the Program Manager's guidance. Furthermore, the Contracting Officer is negotiating after the fact from a severely eroded position because at least a portion of the work has already been performed.

Four of the claims in this category were settled. Settlement rates ranged from 32.7% to 54.7% of the original claim value. Based upon this limited experience, no firm conclusions could be drawn.

3. Specifications (\$27.7M)

NAVAIR Headquarters received nine claims based on specifications which totaled \$27,731,391. The claims ranged in dollar value from \$11.4M to \$500K. The claims are detailed in Appendix D.

Specific problems experienced include: defective TDPs, vague and ambiguous specifications, inadequate specifications, Government changes to the specifications, and costs incurred to improve the Government drawing package.

Clarity when drafting specifications is essential for the success of a program. All of the cases in this category involved contracts with design specifications. These specifications tell a contractor in great detail exactly how to build a particular item. Design specifications tend to be large, complex packages which are very difficult to

validate. DoD has recognized the drawback of this contracting strategy and has directed buying activities to use performance specifications when purchasing new systems, major modifications, and commercial and non-developmental items. [Ref. 16] Performance specifications shift the design risk to the contractor and allow for a potentially greater range of technical solutions. It is not clear that the use of performance specifications would have prevented these claims, but the approach offers significant potential for reducing specifications based claims. While clarity in drafting performance specifications remains essential to their success, use of performance specifications should result in a dramatic reduction in specifications based claims.

Six of the claims in this category were settled. Settlement rates ranged from 24.0% to 100%. There was no clear trend to the settlement rates and no conclusions could be drawn.

4. GFE/GFP (\$18.2M)

NAVAIR Headquarters received seven claims based on GFE/GFP totaling \$18,266,343. The claims ranged in dollar value from \$10.1M to \$307K. These claims are detailed in Appendix E. All of these claims were submitted for GFP which was late and/or deficient. When the Government agrees to deliver GFP according to a schedule, contractors make

their plans based upon that schedule. Therefore, it is not surprising that late or defective GFP is disruptive to a program. Government property management is not always given the highest priority, but in these cases, it needed to be given more management attention. The F/A-18E/F Engineering and Manufacturing Development Program recognized the potential for GFP related problems and dedicated a GS-14 to managing GFP. As a result, the program has experienced no GFP related claims to date. [Ref. 17] Not every program office has the resources to dedicate a GS-14 to managing GFP, nor would that be appropriate for every program. However, this oft neglected area has generated seven claims and is deserving of attention.

Four of these claims have been settled. Settlement rates for the claims ranged from 38.5% to 100% of the original claim value. The settlement rates tended to be either around 40% or above 90% of the original claim value. No firm conclusions could be drawn from these data.

5. Terms and Conditions (18.1M)

NAVAIR Headquarters received two claims based on terms and conditions totaling \$18,106,000. The claim dollar values were \$16.8M and \$1.4M. These claims are detailed in Appendix F. While NAVAIR Headquarters had only two claims in this category, one represents a significant potential liability with a claimed value of \$16.8M. In that claim,

the contractor and the Government disagree over the meaning of various terms and conditions of the contract.

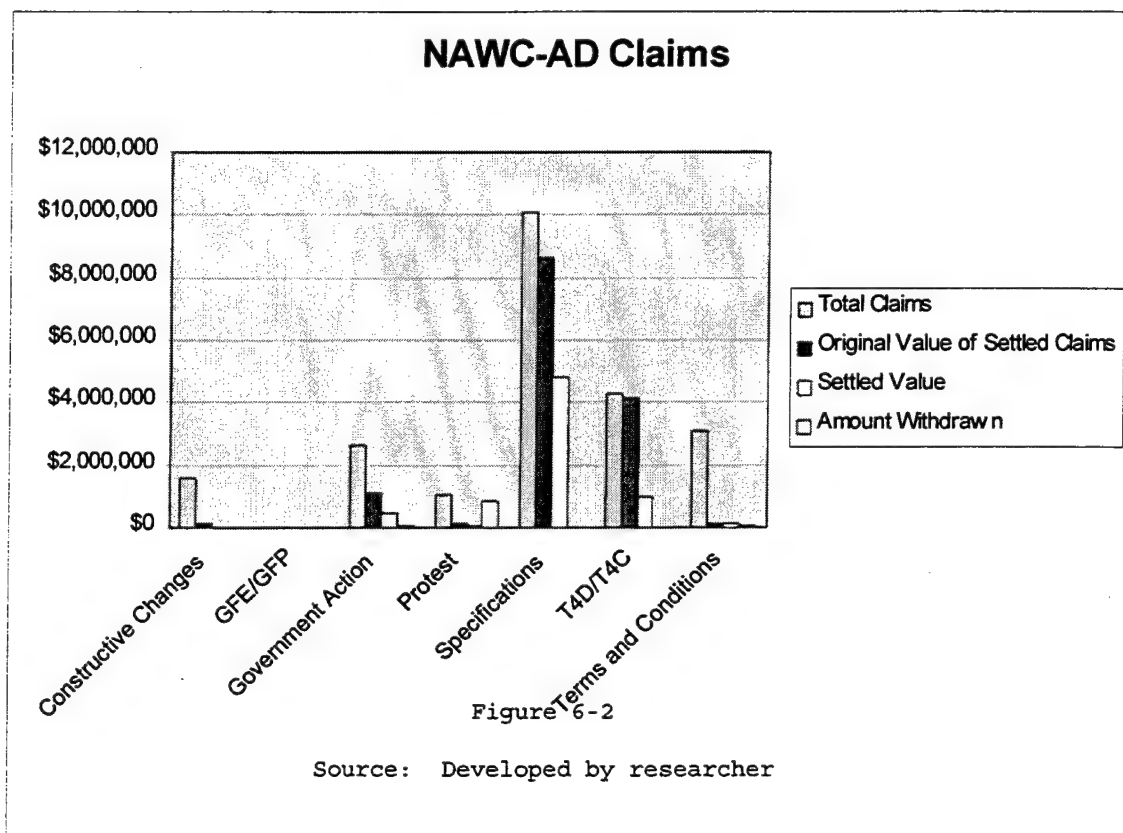
In the other claim, the language used in the contract modification implementing an Engineering Change Proposal (ECP) was unclear regarding consideration for the ECP. The company asserted in its claim that they had not been compensated.

The NAVSEA Claims Avoidance Handbook stresses two points pertinent to these claims. They are: (1) write clearly understood terms and conditions, and (2) ensure everyone understands them. While it is not clear what role the Post-Award Orientations Conferences (PAOCs) played in helping these programs head off claims, a properly conducted PAOC provides an excellent opportunity to review the terms and conditions and address potential areas of misunderstanding with personnel from both the contractor and the program office. Frequent, open communication between both parties is crucial to uncovering potential problem areas and focusing management attention on them. The most recent revision to the DoD 5000 series regulation emphasizes cooperative teaming between the Government and the contractor through the use of IPTs. This can go a long way towards fostering an atmosphere conducive to early problem resolution.

None of the claims in this category have been settled.

C. NAWC-AD CLAIMS

NAWC-AD experienced 20 claims totaling \$20,327,934. Figure 6-2 shows the distribution of these claims as broken down by category. Specifications was the largest category at \$10.1M, followed by T4C/T4D (\$4.3M), Terms and Conditions (\$3.1M), Government Actions (\$2.6M), Constructive Changes (\$1.6M), and Protest (\$1.0M).



T4C/T4D represented the largest average claim value for NAWC-AD at \$2.1M. However, there were only two claims in this category and this figure was inflated by a \$4.2M claim. Specifications was similarly inflated by a \$5.1M claim.

After excluding the effects of that claim, the average claim value remained the highest at \$829K. This was followed, in order of average claim size, by Constructive Changes (\$805K), Government Actions (\$652K), Terms and Conditions (\$618K), and Protest (\$511K). Of these claims, 12 were settled at an average settlement rate of 45.0% of the original claim value.

1. Specifications (\$10.1M)

NAWC-AD received seven claims in this category totaling \$10,082,720. The claims ranged in value from \$5.1 M to \$25K. These claims are detailed in Appendix G. Five of the claims asserted defective drawings and/or specifications. Two of the claims asserted defective Technical Data Packages (TDPs).

As stated above, clarity in writing specifications is essential, as is careful review of them both during the pre-award phase and at the post-award orientation conference. Increased use of performance specifications can also help reduce specification based claims. TDPs should be carefully reviewed and given to the contractor at the earliest opportunity. Problems with the TDP should be identified and resolved as early as possible.

Six of the seven claims in this category have been settled. Settlement rates ranged from 4.1% to 105.6% of the

original claim value. No conclusions could be drawn from these data.

2. T4C/T4D (\$4.2M)

NAWC-AD received two claims based on T4C/T4D totaling \$4,274,919. The claim dollar values were \$4.2M and \$119K. These claims are detailed in Appendix H.

This category was dominated by claim 97-15AD \$4.2M, where the contractor was seeking to recover costs incurred under the contract which they asserted were not covered under the termination agreement. The other claim, 97-10AD, \$119K, claimed increased unit costs resulting from a partial termination for the convenience of the Government.

When negotiating a termination agreement, it is important to ensure all efforts performed under the contract are identified and addressed. This is particularly important in the case of a termination because an adversarial relationship which is conducive to generating claims is more likely to arise in these cases.

Claim 97-15AD was settled for 23.4% of the original claim value. This was insufficient information to draw any conclusions.

3. Terms and Conditions (\$3.1M)

NAWC-AD received five claims based on terms and conditions totaling \$3,089,544. The claims ranged in dollar

value from \$1.7M to \$53K. The claims are detailed in Appendix I.

Two claims dominated this category, accounting for 93% of the total dollar value. In the largest claim, 98-2AD \$1.7M, the contractor provided some units under a CPIF development contract. According to the terms of the basic contract, the company's share of the cost sharing arrangement was not recoverable. However, contradictory language in subsequent contract modifications stated that the company may attempt to recover some of those costs. The company attempted to recover the costs under the production portion of the contract and was denied.

Claim 98-1AD \$1.1M, was submitted to recover the costs of additional meetings and briefings conducted over the course of the contract. The remaining claims involved cost overruns and alleged unreimbursed costs.

Contract modifications need to be carefully scrutinized to ensure they are consistent with the other terms of the contract. In the case of claim 98-2AD, the contract modifications may have negated the incentive system written into the original contract.

When executing a contract, the program office needs to be knowledgeable of the meetings and reporting requirements which are covered by the contract. If additional meetings or briefings are required, the program office should verify whether they are covered by the contract and confirm that

the contractor interprets the contract similarly. If they are not covered, the contracting officer should be consulted so he can reach an agreement with the contractor and, if necessary, put a contract modification in place.

The remaining claims fall under the purview of contract administration. When a contractor approaches their ceiling under a cost reimbursement contract, they need to be closely monitored. DCAA should be consulted to determine the impacts of potential rate changes.

Two of these claims were settled and one was withdrawn. Settlement rates were 74.3% and 100% of the original claim values. No conclusions could be drawn from these data.

4. Government Actions (\$2.6M)

NAWC-AD received four claims based on Government Actions totaling \$2,609,370. The claims ranged from \$1.5M to \$58K. The claims are detailed in Appendix J.

The largest claim, 97-14AD \$1.4M, asserted delays experienced during Government testing increased costs. Claim 97-1AD, \$910K, also cited delays caused by the Government. This claim had multiple causes. Claim 97-16AD, \$192K, claimed loss of efficiencies and learning curve losses due to the exercise of options out of order. In this case, the contractor was behind schedule on a development contract. As a result, the Government opted not to exercise the first set of Low Rate Initial Production (LRIP) options

and instead waited until the next year to exercise those LRIP options when the contractor was actually ready to enter LRIP. The final claim asserted damages as a result of a stop work order (SWO).

The first two claims illustrate again, that it is critically important for the Government to fulfill its responsibilities under a contract in a timely manner.

The contractor submitting claim 97-16AD appears to be experiencing problems and as a result, trying to increase or recover their profitability on the contract. In this case, the Government appears to have acted prudently. Recognizing the signs of a contractor experiencing problems and fully documenting all Government actions are key to making it possible for the Government to refute spurious claims and ultimately reach a fair settlement. As mentioned above, the cooperative teaming arrangements advocated in the DoD 5000 series regulation can be expected to provide a vehicle for recognizing and addressing potential issues such as these early in the process and taking steps to minimize their impacts.

Two of these claims were settled and one was withdrawn. The settlement rates were 38.0% and 44.2% of the original claim values. No conclusions could be drawn from these data.

5. Constructive Changes (\$1.6M)

NAWC-AD received two claims based on Constructive Changes totaling \$1,610,330. The claim dollar values were \$1.5M and \$158K. These claims are detailed in Appendix K.

This category was dominated by claim 97-5AD, \$1.5M. The contractor alleged part number changes and various other constructive changes. This claim also asserted a defective TDP and is counted in the specifications category as well. Claim 97-18AD, \$159K, asserted the Government required additional training classes, manuals and data analysis and dictated software changes.

As mentioned above, Government personnel need to know the terms of the contract and the scope of their authority. Program Managers need to control the direction process to prevent constructive changes from occurring and to ensure any questionable areas are brought to the PCO's attention immediately.

Claim 97-18AD was settled for 18.3% of the original claim value. This was not sufficient information to draw any conclusions.

6. Protest (\$1.0M)

NAWC-AD received two claims based on Protests totaling \$1,022,795. The claim dollar values were \$879K and \$143K. These claims are detailed in Appendix L.

Both claims were submitted as the result of SWOs issued because of protests. One of these, 97-2AD \$879K, was judged to be unsupported and the contracting officer issued a COFD denying the claim. The contractor appealed to the ASBCA and subsequently withdrew the claim.

Integrity in the contract award process and good unsuccessful offeror debriefings are key to minimizing award protests. Unfortunately, given the volume of contracts issued by all of the NAVAIR activities, it is unlikely there will never be a protest. When a protest is received, the Program Manager and contracting officer need to work closely with the contractor to minimize the impact of the SWO.

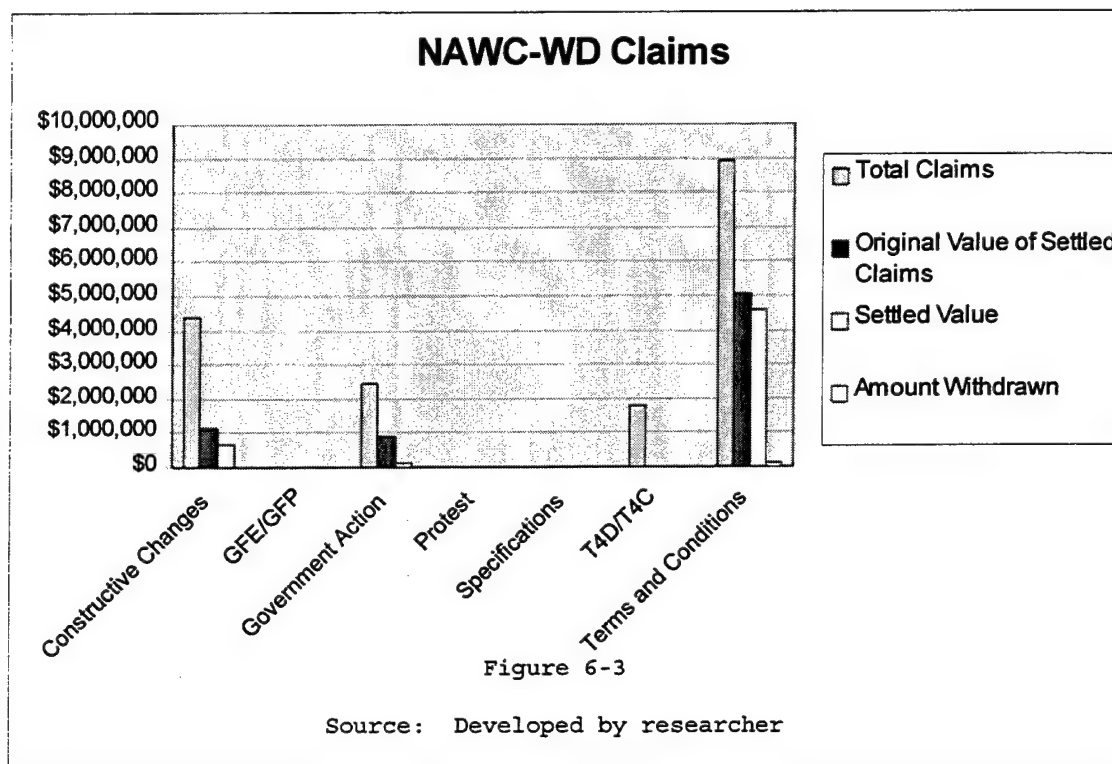
Claim 97-12AD was settled for 55.8% of the original claim value. This was not sufficient information to draw any conclusions.

D. NAWC-WD CLAIMS

NAWC-WD experienced 23 claims totaling \$17,553,936. Figure 6-3 shows these claims as broken down by category. The most significant category was Terms and Conditions (\$8.9M), followed by Constructive Changes (\$4.4M), Government Actions (\$2.4M), and T4C/T4D (\$1.8M).

Terms and Conditions represented the largest average claims at \$991K, but this figure is inflated by a \$5.0M claim. Excluding the effects of that claim yields an average claim value of \$490K. The average claim value for

Constructive Changes was similarly distorted by a \$2.6M claim. Excluding the effects of that claim yields an average claim value of \$304K. After making these adjustments, T4C/T4D resulted in the largest average claim at \$892. This was followed, in order of average claim size, by Terms and Conditions (\$490K), Government Actions (\$488K), and Constructive Changes (\$304K).



Eight of these claims were settled at an average settlement rate of 74.8%. Nine of the 23 claims experienced were submitted by the same contractor which appeared to be experiencing financial problems. Seven of these nine claims

have been consolidated into one claim for tracking purposes by AIR 2.5.1 and are listed as claim 97-1WD.

1. Terms and Conditions (\$12.6M)

NAWC-WD received 9 claims based on Terms and Conditions totaling \$8,917,850. The claims ranged from \$5.0M to \$19K. The claims are detailed in Appendix M.

The largest claim in this category, 97-10WD, \$5.0M, was related to a time and material contract where the skill mix requested for work under the contract was different from the skill mix in the proposal. What appears to have been an unbalanced proposal resulted in increased costs of performance. Careful review of proposed skill mixes during proposal evaluation is the only way to prevent this type of claim.

Claim 97-1WD, \$2.1M, was based on a disagreement between the contractor and the Government over finance charges due on a lease to own program. This was combined with claim 97-1WD \$439K, from the same contractor requesting monthly fees they say are due for port maintenance. The same contractor submitted claim 97-3WD \$19K for increased engineering costs due to differing site conditions. The claim alleges the Navy had superior knowledge about the site which was not revealed during negotiations. These three claims were all submitted by the contractor which appeared

to be experiencing financial difficulties and was attempting to improve their profit margin through the use of claims.

The remaining claims can be attributed to factors beyond the control of both the Government and the contractor, such as a collective bargaining agreement, and incurred overrun by the original contractor subsequent to a corporate takeover and contract novation. Claim 98-5WD, \$100K, asserted that a necessary change in subcontractors caused redesign costs beyond their control. This claim was withdrawn in its entirety.

Only three of these claims have been settled. Settlement rates ranged from 90.3% to 100% of the original claim value. This may suggest that claims originating because of factors beyond the control of the contractor and the Government are likely to have a high settlement rate, but the data are not sufficient to draw any firm conclusions.

2. Constructive Changes (\$4.4M)

NAWC-WD received seven claims based on Constructive Changes totaling \$4,412,265. The claims ranged from \$2.6M to \$25K. The claims are detailed in Appendix N.

Three of the claims, 97-1WD, \$2.6M, \$423K, and \$258K, are from the contractor experiencing financial difficulties and allege various constructive changes.

Claim 97-4, \$803K, requested compensation for work performed on delivery orders which exceeded the Not-to-Exceed (NTE) amount of the contract. Both Government and contractor personnel are responsible for ensuring that delivery orders issued and accepted will not exceed the NTE value.

Claim 97-11WD asserted additional work was ordered by the Government for a range operations contract. Contract for services such as range operations may be particularly susceptible to constructive changes because of the number of personnel interfacing with the contractor during performance. The first line of defense in this case would be to educate the range operations personnel in basic contracting procedures and the terms of the contract. These people should also understand the scope of their authority. The contractor must also play an active role in identifying work not covered by the contract and in bringing these issues to the PCO's attention as soon as possible.

The other two claims, 98-3WD, \$60K, and 98-6WD, \$25K, were submitted as REAs by the same contractor and asserted costs incurred to repair damage to aircraft leased to the Government. The Government agreed with the contractor and paid these claims.

Four of these claims were settled. Settlement rates ranged from 43.6% to 99.9% of the original claim values. No conclusions could be drawn from these data.

3. Government Action (\$2.4M)

NAWC-WD received five claims based on Government Actions totaling \$2,440,320. The claims ranged from \$1.1M to \$46K. The claims are detailed in Appendix O.

Three of the claims in this category, 97-1WD, \$1.1M, 97-1WD, \$393K, and 97-2WD, \$46K, were submitted by the same contractor. These claims alleged delay, disruption, acceleration, Government caused overruns on development of a database and alleged access denial to buildings. These claims were submitted by the contractor which appears to be experiencing financial problems.

The other two claims assert lost profits related to requirements contracts where NAWC-WD placed orders with other suppliers. There do not appear to have been any systems in place to ensure all orders for these materials and services would be placed under these contracts.

When an exclusive requirements contract is put in place, personnel at the buying command need to be made aware of it and need to fully document the basis for their decision if that supplier is not to be used.

The two claims regarding the requirements contracts were settled. The settlement rates were 7.4% and 51.0% of the original claims values. No firm conclusions could be drawn from these data.

4. T4C/T4D (\$1.8M)

NAWC-WD received two claims based on T4C/T4D totaling \$1,783,501. The claim dollar values were \$1.1M and \$705K. These claims are detailed in Appendix P.

Claim 97-5WD, \$1.1M, was submitted following a termination for default asserting a balance was owed by the Government for progress payments and deliveries. The Government has filed a counter claim for \$1,699,052 and the case is now in litigation.

Claim 97-7WD, \$704K, was also submitted following a termination for default where the contractor abandoned efforts on the contract. This claim includes correction of the method of computing the Service Contract Act adjustment and additional effort performed.

Both of these claims represent an inability to agree on termination issues and appear to have been difficult to avoid once the programs reached the termination stages.

Neither of these claims has been settled.

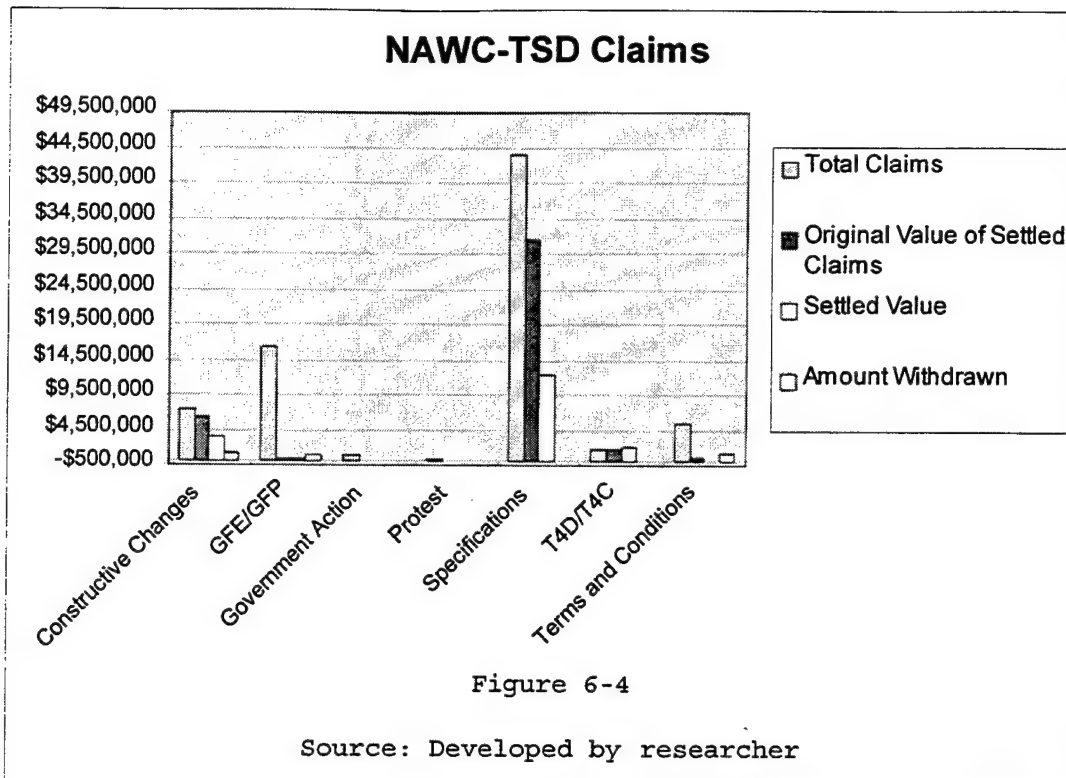
E. NAWC-TSD CLAIMS

NAWC-TSD experienced 22 claims totaling \$75,677,259. Figure 6-4 shows the claims experienced by NAWC-TSD as broken down by category. The two most significant categories were Specifications (\$43.4M) and GFE/GFP (\$16.3M) followed by Constructive Changes (\$7.6M), Terms and

Conditions (\$5.4M), T4C/T4D (\$1.7M), Government Actions (\$.8M), and Protest (\$.4M).

Specifications represented the largest average claim value at \$14.5M. However, this figure is inflated by a \$31.5M claim. Excluding the effects of this claim yields an average claim value of \$5.9M, but this is the average of two claims for \$11.8M and \$44K making the usefulness of this figure questionable.

GFE/GFP is similarly distorted by an \$11.4M claim. Excluding the effects of this claim yields an average claim value of \$822K. Average claim values for Constructive Changes and Terms and Conditions were also distorted by large claims of \$5.8M and \$3.5M, respectively. Adjusting for the effects of these claims yields average claim values of \$600K for Constructive Changes and \$645K for Terms and Conditions. After making these adjustments, Specifications represented the largest claim value at \$5.9M. This was followed, in order of average claim size, by T4C/T4D (\$1.7M), Government Actions (\$886K), GFE/GFP (\$822K), Terms and Conditions (\$645K), Constructive Changes (\$600K) and Protest (\$192K). Ten of these claims were settled at an average settlement rate of 44.6% of the original claim values.



1. Specifications (\$43.4M)

NAWC-TSD received three claims based on Specifications totaling \$43,419,874. The claims ranged from \$31.5M to \$44K. The claims are detailed in Appendix Q.

The largest claim in this category, 98-2TSD \$31.5M, came about because effort was required to develop what was identified in the specifications as a non-developmental item. Claim 98-3TSD, \$11.8M, was a consolidation of eight claims, one of which, alleged specification claims. This claim was later withdrawn in its entirety. The final claim, 98-4TSD \$44K, asserted defective GFI.

Care in writing specifications is essential when drafting the RFP. Items believed to be non-developmental

should be carefully discussed with the contractor during the pre-award phase, particularly if the military requirement imposes unique capabilities. Specification changes need to be carefully controlled and should always be implemented with a contract modification. Finally, all efforts should be made to verify the quality of GFI before delivery to the contractor. Whenever practicable, GFI should be made available to the contractor during the pre-award phase so the issue of defective GFI can be addressed at the outset of the contract.

Two of these claims were settled. Settlement rates were 38.6% and 84.9% of the original claim values. No conclusions could be drawn from these data.

2. GFE/GFP (\$16.3M)

NAWC-TSD received seven claims based on GFE/GFP totaling \$16,299,163. The claims ranged from \$11.3M to \$191K. The claims are detailed in Appendix R.

All of the claims in this category were caused by late GFP. When GFP is provided under a contract, close attention should be paid to ensuring operable GFP is delivered in a timely manner. This category provides a clear illustration of the potential impacts to progress if GFP is delivered late. Delays should be addressed up front with the contractor and the Government should carefully document all actions taken. Notably, both of the claims which were

withdrawn, 97-11TSD, \$403K and 98-1TSD, \$496K, went to litigation and the Government's documentation was sufficient to refute the contractors' claims. However, effort should be expended to ensure GFP is delivered on time.

Two of these claims were settled and two were withdrawn. Settlement rates were 73.1% and 79.9% of the original claim values. No conclusions could be drawn from these data.

3. Constructive Changes (\$7.6M)

NAWC-TSD received four claims based on Constructive Changes totaling \$7,569,959. The claims ranged from \$5.8M to \$450K. The claims are detailed in Appendix S.

This category is dominated by claim 97-2TSD, \$5.8M, in which the contractor asserted that Government direction during contract execution caused additional expenses. In claim 97-14TSD \$.5M, the contractor claims that Government directed changes to the software baseline for a training system caused delays and inefficiencies. The other two claims went to litigation and were subsequently withdrawn.

As mentioned above, control of the Government direction process during contract execution is critical to ensuring changes to the work under the contract are contractually implemented.

The two claims which were not withdrawn were settled for 55.4% and 74.4% of the original claim values. No conclusions could be drawn from these data.

4. Terms and Conditions (\$5.4M)

NAWC-TSD received four claims based on Terms and Conditions totaling \$5,418,749. The claims ranged from \$3.5M to \$43K. The claims are detailed in Appendix T.

The largest claim in this category, 97-16TSD \$3.5M, asserted that since a Not-To-Exceed (NTE) provisioned order was not definitized in 180 days as required in the original agreement, the NTE ceiling price does not apply. The Contracting Officer issued a COFD denying the claim and the contractor has appealed the decision to the ASBCA. Litigation is currently pending. The other three claims represented various reasons why each contractor should be paid more money under their contracts. In each of these three cases, the Government called into question the legal basis for these claims and was able to negotiate very favorable settlements for the Government. In the case of, Claim 97-10TSD, \$558K, a COFD denying the claim was appealed to the ASBCA. Following a negative ASBCA ruling the Government and the contractor reached a settlement which reduced the contract price by \$50,000. The very low settlement rate experience with these claims suggests that they were merely attempts by the various contractors to

increase their profitability on those contracts and are largely without merit. In cases where the contractor is experiencing financial difficulties and is determined to improve their profitability through the use of claims, there appears to be little the Government can do to prevent them.

Two of these claims were settled for 0% and -9% of the original claim values. While both were very low, no firm conclusions could be drawn from these data.

5. T4C/T4D (\$1.7M)

NAWC-TSD received one claim based on T4C/T4D with a claimed dollar value of \$1,700,000. This claim is detailed in Appendix U.

This claim was an appeal to the ASBCA of a termination for default asserting that the contract had been improperly terminated. Subsequent to the termination, the contractor filed for bankruptcy. The ASBCA ruled in favor of the contractor and the claim was settled for \$2M.

When problems begin to develop with a contractor and termination becomes a possibility, legal counsel should be consulted to ensure all procedures are followed correctly. Given that this was the only case of this type, this does not appear to be a major problem area for NAWCF-TSD.

This claim was settled by an ASBCA ruling for 117.6% of the original claim value.

6. Government Action (\$.9M)

NAWC-TSD received one claim based on Government Actions with a dollar value of \$886,351. This claim is detailed in Appendix V.

This claim asserted breach of the Government's software license for a ship control trainer. The Government rejected the claim and the contractor appealed to the ASBCA. The claim is currently in litigation.

When dealing with software data rights, the issues are complex and legal counsel should be consulted whenever there is a question.

F. SUMMARY

This chapter examined the claims experience at NAVAIR Headquarters and the three warfare centers in detail. A number of trends were noted, but generalizations about claim categories are difficult to make due to the unique circumstances surrounding each claim. The next chapter presents answers to the research questions, conclusions and recommendations, and recommendations for areas of further research.

VII. CONCLUSIONS AND RECOMMENDATIONS

A. INTRODUCTION

This chapter is divided into four sections. The first provides answers to the research questions. The second and third present conclusions and recommendations respectively. The fourth recommends areas for further research.

B. RESEARCH QUESTIONS

1. Primary Research Question

What is NAVAIR's experience with contract claims and REAs and how might they change their business practices to reduce the number of claims and REAs submitted?

NAVAIR and their subordinate activities have experienced a large number of claims, many of which appear to have been preventable. The number of claims and REAs can be reduced by increasing communication, both within program offices and between the contractors and the Government through the use of IPTs and the IPPD process. Increased use of performance specifications can be expected to significantly reduce specification based claims. But clarity in drafting these specifications remains paramount. Constructive changes appear to be a persistent problem and can be combated by educating contractor and Government personnel and by involving the contracting officer in all

areas which could potentially change the work of the contract. Finally, Program Managers need to identify vulnerable areas within their program and ensure appropriate management attention is focused on those areas.

More specific actions for the individual activities are addressed below in Conclusions and Recommendations.

2. Secondary Research Questions

(1) How can the claims be categorized according to cause?

It was very useful to break down the claims according to the following categories: Constructive Changes, GFE/GFP, Government Actions, Protests, Specifications, T4C/T4D, and Terms and Conditions. In a number of cases, categorizing the claims to this level of detail resulted in the claims having multiple causes. Breakdowns of the amounts of the claims attributable to each cause were not always available which made analysis somewhat more difficult.

(2) Which claims categories cause the largest individual and aggregate contingent liabilities?

Claims representing the largest individual contingent liabilities are presented by activity:

NAVAIR Headquarters

Government Actions	\$390,000,000
Constructive Changes	\$48,000,000
	\$11,366,000
	\$10,700,000
Terms and Conditions	\$16,753,000
Specifications	\$11,388,000
GFE/GFP	\$10,139,378

NAWC-AD

Specifications	\$5,106,365
	\$1,725,805
T4C/T4D	\$4,155,982
Terms and Conditions	\$1,738,200

NAWC-WD

Terms and Conditions	\$5,000,000
	\$2,100,000
Constructive Changes	\$2,585,723
T4C/T4D	\$1,079,022
Government Actions	\$1,072,590

NAWC-TSD

Specifications	\$31,548,315
	\$11,827,615
GFE/GFP	\$11,364,627
Constructive Changes	\$5,771,054
Terms and Conditions	\$3,484,464

Claims Categories representing the largest aggregate contingent liabilities are presented by activity:

NAVAIR Headquarters

Government Actions	\$405,793,449
Constructive Changes	\$79,630,567
Specifications	\$27,731,391
GFE/GFP	\$18,226,343
Terms and Conditions	\$18,106,000
T4C/T4D	\$2,445,674

NAWC-AD

Specifications	\$10,082,720
T4C/T4D	\$4,274,919
Terms and Conditions	\$3,089,544
Government Actions	\$2,609,370
Constructive Changes	\$1,610,330
Protest	\$1,022,795

NAWC-WD

Terms and Conditions	\$8,917,850
Constructive Changes	\$4,412,265
Government Actions	\$2,440,320
T4C/T4D	\$1,783,501

NAWC-TSD

Specifications	\$43,419,874
GFE/GFP	\$16,299,163
Constructive Changes	\$7,569,959
Terms and Conditions	\$5,418,749
T4C/T4D	\$1,700,000
Government Actions	\$886,351
Protest	\$383,163

(3) Which claims categories tend to be the most successful in terms of settlement amount as compared to the original claim value?

Claim settlement rates depended upon the individual merits of each claim and varied widely between claims within categories. This variability severely detracts from the usefulness of comparison of claim settlement rates by category and made it impossible to draw any firm conclusions based on the data available.

(4) How many of the claims in each category could potentially have been prevented and how might they have been mitigated or prevented?

The degree of preventability of a claim is largely judgmental. There were many cases where contractors appeared to be experiencing financial problems and submitted claims in an effort to improve their financial position. There appears to be little the Government can do to prevent these claims, but recognizing the potential for a contractor to adopt this strategy and carefully documenting Government actions taken and rationale behind decisions are key steps to being able to refute these claims. The following evaluation addresses the various categories exclusive of claims having questionable bases.

Constructive Changes: These claims appeared to be largely preventable. Specific steps to minimize constructive changes claims include: (1) foster strong communication between the contractor and the Government through the use of IPTs and the IPPD process; (2) educate contractor and Government personnel on constructive changes and procedures for initiating contract modifications; (3) educate contractor and Government personnel on the terms of the contract; (4) educate Government personnel on the scope of their authority to make changes to the work under the contract; (5) implement procedures in program offices, such as Configuration Control Boards, to firmly control the

direction process; and (6) implement agreements with contractors to establish ground rules for handling potential constructive changes.

GFE/GFP: The majority of the claims in this category concerned GFP and appeared to have been largely preventable. The incidence of these claims can be reduced by the following actions: (1) ensure that GFP is in acceptable condition before committing to providing it; (2) ensure GFP is properly accounted for; and (3) ensure GFP is delivered on time. This can all be accomplished by ensuring appropriate management attention is dedicated to GFP management.

Government Actions: Many of these claims appeared to have been preventable to some degree, but there were several cases where the claims could not have been prevented. In these cases, all possible efforts should be made to work with the contractor to minimize the impacts of the situation driving the potential claim. Specific actions to prevent or minimize the impacts of Government Actions claims are as follows: (1) develop a system to ensure all Government obligations under a contract are met; (2) when it appears the Government cannot meet all of its obligations under the contract, address the issue early with the contractor to develop work arounds and minimize the impact; (3) whenever possible, avoid guaranteeing a supplier a fixed percentage of all future production buys on a particular

item. If this provision must be used, ensure the agreement is not left open ended; (4) ensure the entire organization is aware of exclusive requirements contracts in place and establish a central point of contact for that particular commodity. With the increased use of the micro-purchase card, this type of vehicle becomes less practical.

Protests: All of the protest related claims were submitted because a SWO was issued following the protest of a contract award. The claims themselves in this scenario are essentially unpreventable. The only way to prevent these types of claims is not to have any contract award protests. This flows from the integrity of the source selection process and the perceived fairness of that process. NAVAIR has experienced very few protest related claims and does not appear to have a problem in this area.

Specifications: Design specifications are very difficult to validate and manage. In light of this, the Office of the Secretary of Defense (OSD) has directed the use of performance specifications whenever possible. Therefore, to the extent that performance specifications are expected to correct many of the problems associated with design specifications, all design specification based claims may be said to be largely preventable. In cases where GFI such as TDPs will be used, all possible efforts should be made by Government personnel to validate its quality. GFI should be provided to the contractor at the earliest

opportunity so that any potential issues can be addressed immediately.

T4C/T4D: Claims submitted in response to terminations seemed to be very difficult to avoid because of the logical incentive for the contractor to attempt to recover as much as possible through the claims process. Programs facing a potential termination should take special care to document all actions and communications with the contractor, as well as the rationale behind all decisions. Legal counsel should be closely involved in a termination to help ensure appropriate actions are taken to protect Government interests.

As with protests, the best way to avoid termination related claims is to not have any terminations. While this is hardly reasonable to expect, recognition of the early signs of a contractor experiencing trouble can enable the program office to begin working with the contractor while taking the necessary steps to protect the Government's best interests. Based on the low number of termination related claims, the relatively low dollar value for this category, and the current status of the active termination claims, NAVAIR does not appear to have a problem in this area.

Terms and Conditions: While Terms and Conditions claims were spread across the spectrum from not preventable to fully preventable, most were somewhere in-between.

Claims for an adjustment allowed under the terms of the contract were largely unpreventable. The most preventable claims arose from differing interpretation of contract terms. DCMC should be brought in early in the solicitation process to review the draft RFP and provide comments. Particular attention should be paid to industry comments to a draft RFP as an indicator for potential areas of misunderstanding or different interpretations of provisions. This attention should continue through the proposal analysis phase. Increased use of oral proposal presentations provides an excellent opportunity to identify and resolve areas of disagreement. Finally, the post-award orientation conference is a good forum to ensure terms are fully understood by all parties.

(5) Which categories offer the most opportunity for improvements?

Government Actions, Constructive Changes, GFE/GFP, and specifications based claims represent large dollar values, were largely preventable and offer the most opportunity for improvement. Terms and Conditions based claims also represent large dollar values, were partially preventable and offer some opportunity for improvement. Areas of improvement for the individual commands are detailed below in Conclusions and Recommendations.

(6) What specific actions should be taken to reduce the quantity and size of claims for each category?

Constructive Changes: Specific steps to minimize constructive changes claims include: (1) foster strong communication between the contractor and the Government through the use of IPTs and the IPPD process; (2) educate contractor and Government personnel on constructive changes and procedures for initiating contract modifications; (3) educate contractor and Government personnel on the terms of the contract; (4) educate Government personnel on the scope of their authority to make changes to the work under the contract; (5) implement procedures in program offices, such as Configuration Control Boards, to firmly control the direction process; and (6) implement agreements with contractors to establish ground rules for handling potential constructive changes.

GFE/GFP: Specific steps to minimize GFE/GFP claims include: (1) ensure that GFP is in acceptable condition before committing to providing it; (2) ensure GFP is properly accounted for; and (3) ensure GFP is delivered on time. This can all be accomplished by ensuring appropriate management attention is dedicated to GFP management. If practicable, assign GFP management responsibility to a mid to senior grade manager and designate that position as a full-time responsibility.

Government Actions: Specific actions to prevent or minimize the impacts of Government Actions claims are as follows: (1) develop a system to ensure all Government

obligations under a contract are met; (2) when it appears the Government cannot meet all of its obligations under the contract, address the issue early with the contractor to develop work arounds and minimize the impact; (3) whenever possible, avoid guaranteeing a supplier a fixed percentage of all future production buys on a particular item. If this provision must be used, ensure the agreement is not left open ended; (4) ensure the entire organization is aware of exclusive requirements contracts in place and establish a central point of contact for that particular commodity. With the increased use of the micro-purchase card, this type of vehicle becomes less practical.

Protest: The only way to prevent these types of claims is not to have any contract award protests and issue the requisite SWOs. This flows from the integrity of the source selection process and the perceived fairness of that process. When a SWO must be issued, the program office and the contracting officer should address the issue early with the contractor to develop work arounds and minimize the impact. NAVAIR has experienced very few protest related claims and does not appear to have a problem in this area.

Specifications: The Office of the Secretary of Defense (OSD) has directed the use of performance specifications whenever possible. Use of performance specifications is expected to correct many of the problems associated with design specifications, and should reduce the

incidence of specifications based claims. In cases where GFI such as TDPs will be used, all possible efforts should be made by Government personnel to validate its quality. GFI should be provided to the contractor at the earliest opportunity so that any potential issues can be addressed immediately.

T4C/T4D: Programs facing a potential termination should take special care to document all actions and communications with the contractor, as well as the rationale behind all decisions. Legal counsel should be closely involved in a termination to help ensure the correct actions are taken to protect the interests of the Government.

As with protests, the best way to avoid termination related claims is to not have any terminations. While this is hardly reasonable to expect, recognition of the early signs of a contractor experiencing trouble can enable the program office to begin working with the contractor while taking the necessary steps to protect the Government's interests. Based on the low number of termination related claims, the relatively low dollar value for this category, and the current status of the active termination claims, NAVAIR does not appear to have a problem in this area.

Terms and Conditions: Particular attention should be paid to industry comments to a draft RFP as an indicator for potential areas of misunderstanding or different

interpretations of provisions. This attention should continue through the proposal analysis phase. Increased use of oral proposal presentations provides an excellent opportunity to identify and resolve areas of disagreement. Finally, the post-award orientation conference is a good forum to ensure terms are fully understood by all parties.

C. CONCLUSIONS

1. NAVAIR Headquarters

Government Actions have been a significant problem for NAVAIR Headquarters. In particular, the failure to adhere to the Investment Incentive Clause of an aircraft engine contract cost the Government \$150M. Implementation of testing plans has also caused problems.

Constructive Changes are another problem area for NAVAIR Headquarters. Changes to the work of the contracts were generally appeared to be in the best interests of the Government, but were not contractually implemented.

Specifications have historically produced a large number of claims, but should reduce as performance based specifications are used on more contracts.

GFP management is a problem for NAVAIR Headquarters and requires management attention.

Terms and Conditions, Protests and T4C/T4D do not appear to represent problem areas.

2. NAWC-AD

Specifications have historically been a problem area for NAWC-AD, but should decrease with the increased use of performance based specifications.

T4C/T4D resulted in a large dollar value of claims submitted, but only represents two claims. This does not appear to be a problem area.

Based on the experience with the two claims in the Government Actions category, Government testing does not represent a significant problems, but is worthy of attention.

Constructive Changes and Protests were relatively small categories in terms of number of claims and dollar value and do not appear to represent problem areas for NAWC-AD.

3. NAWC-WD

While Terms and Conditions represented the most claims and the largest dollar value, two of the claims were from the contractor which appeared to be experiencing problems and all but one of the others appeared to have been largely unpreventable.

Because NAWC-WD operates test ranges which involve a number of non-procurement personnel interfacing with the contractors, NAWC-WD appears to be vulnerable to Constructive Changes.

Requirements contracts have also caused problems for NAWC-WD. T4C/T4D does not appear to be a problem area.

4. NAWC-TSD

Although large in dollar value, NAWC-TSD only experienced three Specifications claims. Again, use of performance specifications should help reduce their vulnerability to these types of claims.

NAWC-TSD has experienced a large number of claims for late GFP and needs to focus management attention on this area.

Constructive Changes, Terms and Conditions, and Government Actions do not appear to be problem areas for NAWC-TSD.

D. RECOMMENDATIONS

1. NAVAIR Headquarters

NAVAIR Headquarters should avoid contracts that guarantee a percent of all follow-on production items to a contractor. Where this cannot be avoided, they should ensure the provisions are not left open ended.

Program managers should ensure test plans are realistically developed and implemented as planned. When deviations from the schedule are anticipated, they should work closely with the contractor to minimize the impacts. Use of the IPPD process and IPTs are key to this process.

Constructive Changes have caused a number of problems for NAVAIR Headquarters. Program managers should ensure all personnel are adequately trained on what constructive changes are, how to recognize a potential constructive change, the scope of their authority to order changes under the contract, and on the terms of the actual contract. Contractors should be similarly encouraged to train their personnel to recognize and avoid constructive changes. Program managers should ensure contracting officers are included in major program meetings where program direction will be discussed and there is a chance of constructive changes occurring. Free and open communication between the contractor and the Government is essential to avoiding constructive changes. There should be a caveat in the last paragraph in all Government correspondence signed out by anyone other than the Contracting Officer which states:

The above should not be considered a change to the terms and conditions of contract [contract number]. If you believe otherwise, you should not initiate any action, nor incur any costs attempting to comply with the above and should provide written notice of your concerns to the Procuring Contracting Officer within 10 days of the date of this letter.

Late GFP is also a problem area. Program managers should ensure adequate levels of management attention are dedicated to verifying the condition of GFP, ensuring it is properly accounted for, and ensuring it is delivered as scheduled.

Specifications have generated a large number of claims in the past. Use of performance specifications should help alleviate some of this, but clarity in drafting the specifications remains critical.

2. NAWC-AD

Specifications have been a problem area for NAWC-AD in the past. The use of performance specifications should help alleviate some of this, but clarity in drafting specifications remains key.

Terms and Conditions also represent a problem area. To reduce conflicting interpretations of contract provisions, contracting officers should carefully review industry comments on draft RFPs, focus on potentially unclear areas during negotiations and make full use of the PAOC to establish lines of communication, identify responsibilities and identify and resolve potential problem areas.

NAWC-AD experienced claims asserting delays in Government testing. Program managers should make full use of the IPPD process and IPTs to establish realistic schedules, ensure testing is conducted as planned and work with the contractor to develop work arounds if it appears there will be a deviation from the schedule. Free and open communication between the Government and the contractor is key to this process.

3. NAWC-WD

Because of their relatively unique vulnerability to constructive changes on their range operations contracts, NAWC-AD should ensure all personnel involved in range operations are trained on what constructive changes are, how to recognize a potential constructive change, the scope of their authority to order changes under the contract, and on the terms of the actual contract. Contractors should be similarly encouraged to train their personnel to recognize and avoid constructive changes. Free and open communication between the contracting officer and the contractor will allow potential constructive changes to be addressed and resolved quickly.

NAWC-WD should carefully consider command policy with respect to exclusive requirements contracts, particularly in light of the proliferation of the IMPAC card. Where these contracts are in place, they should ensure the entire buying office is aware of the arrangement and a single point of contact should be established to manage that commodity.

4. NAWC-TSD

NAWC-TSD has had problems with Specifications claims. The use of performance specifications should help alleviate some of this, but clarity in drafting specifications remains key.

Late GFP has been a persistent problem for NAWC-TSD. Program managers should ensure adequate levels of management attention are dedicated to verifying the condition of GFP, ensuring it is properly accounted for, and ensuring it is delivered as scheduled.

E. AREAS FOR FURTHER RESEARCH

FAR Part 15, Contracting by Negotiation, was rewritten in January 1998. This update to the FAR significantly changed the regulations governing the exchange of information during the pre-award phase. It would be worthwhile to examine these new procedures and identify areas of risk with respect to protests and possible claims.

Contracting offices have been directed to use performance specifications to the maximum extent possible. Once a sufficient number of these contracts have been executed, an evaluation of their effectiveness in terms of program cost, performance and schedule, and number of contract claims would be useful.

APPENDIX A INITIAL REPORT OF CONTRACTOR CLAIM

INITIAL REPORT OF CONTRACTOR CLAIM

a. Action Type: Claim REA (Circle One)

b. Claim/REA No. _____ e. Program: _____

c. Negotiator Code: _____ Tel: _____ f. Date of CL/REA: _____

d. PCO: _____ Tel: _____ g. Date Received: _____

1. Contractor's Name:

2. Contract Number:

a. Supplies or Services Procured:

b. Total Contract Price, Target Price or Estimated Cost:

3. Amount of Claim/REA:

4. Basis of Claim/REA:

5. Participating Requiring Activities (e.g. SUPSHIP, SCMAO, USAF, etc.):

6. Initial Assessment of Validity of Claim/REA (where possible):

7. Provisional Contract Price Increase or Payment:

Planned Disposition of Claim/REA:

	Baseline	Target	Accomplished
Contract Specialist Assigned	_____	_____	_____
IPT Settlement Team Established	_____	_____	_____
Fiscal Memorandum Received	_____	_____	_____
CAR Received	_____	_____	_____
Audit Report Received	_____	_____	_____
LEM Received	_____	_____	_____
Pre-Neg Clearance Approved	_____	_____	_____
Negotiation Completed	_____	_____	_____
Post-Neg Clearance Approved	_____	_____	_____
Document/Unilateral/Demand Letter Mailed	_____	_____	_____
Mod Executed	_____	_____	_____

Status/Comments: (Discuss rationale upon closure)

9. DCAA Report Number:

Dated: / /

Audited: \$

Pending Litigation:

Yes No

Questioned: \$
Sustained: \$

Reportable: _____
Closed: _____
Criminal Investigation: _____
Duplicate: _____

10. Milestone Dates:

Team Analysis / /
CAR Requested / /
LEM Requested / /

Funds Requested / /
Funds Received / /

11. Settlement Amount: \$

Type: FY \$ (K)
Type: FY \$ (K)
Type: FY \$ (K)

APPENDIX B NAVAIR HEADQUARTERS GOVERNMENT ACTIONS CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement Amount	Settlement Rate
97-7HQ	Different procurement practice	\$2,299,752	**	0%
97-8HQ	Guaranteed percent of follow-on contracts	\$390,000,000	\$150,000,000	38.5%
97-16HQ*	Govt. breach of duty to cooperate with contractor	\$1,300,000	\$711,052	54.7%
97-21HQ	Govt. failed to provide assistance	\$4,100,000	-	N/A
97-26HQ	Govt. delays in testing caused schedule slippage	\$399,978	\$0	0%
98-1HQ*	Govt. failure to execute contract IAW terms of the contract	\$4,679,467	-	N/A
98-2HQ	SWO caused delay and disruption	\$814,000	-	N/A
97-1ACO*	Govt. delays caused financial hardship	\$999,787	-	N/A
97-3ACO*	Govt. delays caused financial hardship	\$1,200,465	-	N/A
Totals		\$405,793,449	\$150,711,052	

* Multiple Causes

** Entire Amount Withdrawn

Source: Developed by researcher

APPENDIX C NAVAIR HEADQUARTERS CONSTRUCTIVE CHANGES CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement Amount	Settlement Rate
97-3HQ	Change in inspection practices	\$48,000,000	-	N/A
97-11HQ	Constructive changes to test efforts	\$1,230,773	\$483,867	39.3%
97-14HQ	Change in inspection practices	\$10,700,000	\$3,500,000	32.7%
97-15HQ	Additional inspections added	\$11,366,000	\$6,218,541	54.7%
97-18HQ	Constructive changes involving ECPs	\$906,000	\$435,000	48.0%
97-20HQ	Govt. directed subcontractor to perform additional work	\$600,000	-	N/A
97-24HQ*	Govt. changed specifications w/o contract modification	\$2,148,327	-	N/A
98-1HQ*	Govt. changed the work without a contract modification	\$4,679,467	-	N/A
Totals		\$79,630,567	\$10,637,408	

* Multiple Causes

Source: Developed by researcher

APPENDIX D NAVAIR HEADQUARTERS SPECIFICATIONS CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement Amount	Settlement Rate
97-6HQ	Govt. configuration changes caused technical problems	\$3,000,000	\$3,000,000	100%
97-10HQ	Govt. provided defective TDP	\$2,849,000	\$1,291,965	45.3%
97-13HQ	Disagreement on interpretation of specifications	\$11,388,000	-	N/A
97-16HQ*	Spec vague and ambiguous	\$1,300,000	\$711,052	54.7%
97-17HQ	Govt. provided defective TDP	\$2,388,000	\$1,208,035	50.6%
97-19HQ	Costs to improve Govt. drawing package	\$500,000	\$120,000	24.0%
97-22HQ	Inadequate specifications	\$2,158,073	**	0%
97-24HQ*	Govt. changed specs w/o modifying the contract	\$2,148,327	-	N/A
97-25HQ	Govt. provided inaccurate tech manuals	\$1,999,991	\$1,250,000	62.5%
Totals		\$27,731,391	\$7,581,052	

* Multiple Causes

** Entire Amount Withdrawn

Source: Developed by researcher

APPENDIX E NAVAIR HEADQUARTERS GFE/GFP CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement amount	Settlement Rate
97-4HQ	Late and defective GFP	\$817,275	\$817,275	100%
97-5HQ	Discrepant GFP	\$10,139,378	\$3,900,000	38.5%
97-9HQ	Defective GFP	\$5,467,000	-	N/A
97-11HQ	Late GFP	\$307,693	\$120,967	39.3%
97-23HQ	Deficient GFP	\$495,210	\$450,316	90.9%
97-1ACO*	Defective GFP	\$999,787	-	N/A
97-3ACO*	Defective GFP	\$1,200,465	-	N/A
Totals		\$18,266,343	\$5,288,588	

* Multiple Causes

Source: Developed by researcher

APPENDIX F NAVAIR HEADQUARTERS TERMS AND CONDITIONS CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement Amount	Settlement Rate
97-2HQ	Failure to pay for an ECP	\$1,353,000	-	N/A
97-12HQ	Meaning of terms and conditions	\$16,753,000	-	N/A
Totals		\$18,106,000	-	

Source: Developed by researcher

APPENDIX G NAWC-AD SPECIFICATIONS CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement amount	Settlement Rate
97-1-AD	Defective drawings	\$910,000	\$346,000	38.0%
97-3/4AD	Deficient specifications	\$621,000	\$656,000	105.6%
97-5AD*	Defective TDP	\$1,451,744	-	N/A
97-6AD	Defective specifications	\$1,725,805	\$758,563	44.0%
97-9AD	Deficient TDP	\$5,106,365	\$3,004,538	58.8%
97-11AD	Defective drawings and specifications	\$242,801	\$10,000	4.1%
97-17AD	Defective specifications	\$25,005	\$12,500	50.0%
Totals		\$10,082,720	\$4,787,601	

* Multiple Causes

Source: Developed by researcher

APPENDIX H NAWC-AD T4D/T4C CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement Amount	Settlement Rate
97-10AD	Reduction in qty caused increased unit costs	\$118,937	-	N/A
97-15AD	Effort incurred prior to termination	\$4,155,982	\$1,000,000	23.4%
Totals		\$4,274,919	\$1,000,000	

Source: Developed by researcher

APPENDIX I NAWC-AD TERMS AND CONDITIONS CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement Amount	Settlement Rate
97-7AD	Unreimbursed Cost	\$64,725	\$64,725	100%
97-13AD	Indirect rate changes caused overrun on CPFF contract	\$87,000	**	0%
97-19AD	Cost overrun	\$53,827	\$40,000	74.3%
98-1AD	Recover cost of meetings and briefings	\$1,145,792	-	N/A
98-2AD	Unclear language in contract re. Cost sharing arrangement	\$1,738,200	-	N/A
Totals		\$3,089,544	\$104,725	

** Entire Amount Withdrawn

Source: Developed by researcher

APPENDIX J NAWC-AD GOVERNMENT ACTIONS CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement amount	Settlement Rate
97-1AD*	Govt. directed changes caused delay and impacted performance	\$910,000	\$346,000	38.0%
97-8AD	Partial SWO	\$58,421	**	0%
97-14AD	Delay during Government acceptance testing	\$1,448,799	-	N/A
97-16AD	Recover loss of learning curve efficiencies due to exercise of options out of sequence - contractor behind in development	\$192,150	\$85,000	44.2%
Totals		\$2,609,370	\$431,000	

* Multiple Causes

** Entire Amount Withdrawn

Source: Developed by researcher

APPENDIX K NAWC-AD CONSTRUCTIVE CHANGES CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement amount	Settlement Rate
97-5AD*	Part number changes, defective TDP and various constructive changes	\$1,451,744	-	N/A
97-18AD	Extra training classes, S/W changes, additional manuals, additional data analysis	\$158,586	\$29,043	18.3%
Totals		\$1,610,330	\$29,043	

* Multiple Causes

Source: Developed by researcher

APPENDIX L NAWC-AD PROTEST CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement amount	Settlement Rate
97-2AD	Delay due to SWO which was issued in response to a protest.	\$879,000	**	0%
97-12AD	Delay due to SWO as a result of a protest	\$143,795	\$80,206	55.8%
Totals		\$1,022,795	\$80,206	

** Entire Amount Withdrawn

Source: Developed by researcher

APPENDIX M NAWC-WD TERMS AND CONDITIONS CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement amount	Settlement Rate
97-1WD	Cost overruns on inside plant circuit installation	\$432,305	-	N/A
97-1WD	Disagreement over financing charges associated with Lease To Ownership Plan (LTOP)	\$2,100,000	-	N/A
97-3WD	Increased engineering costs assoc. w/differing site conditions, superior Navy knowledge	\$18,798	-	N/A
97-9WD	Galley support costs	\$5,000	\$5,000	100%
97-10WD	Forecast labor mix inaccurate, cost growth due to higher cost labor hours being requested	\$5,000,000	\$4,512,754	90.3%
98-1WD	Recover excess costs incurred by collective bargaining agreement	\$968,785	-	N/A
98-2WD	Overruns incurred by original awardee	\$249,224	-	N/A
98-4WD	Fee Adjustment due to difference between fee collected based on DL & total est. fees	\$36,678	\$36,678	100%
98-5WD	Change in Subcontractor required redesign costs	\$100,011	**	0%
Totals		\$8,917,850	\$4,554,432	

** Entire Amount Withdrawn

Source: Developed by researcher

APPENDIX N NAWC-WD CONSTRUCTIVE CHANGES CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement amount	Settlement Rate
97-1WD	Outside plant installation overruns	\$2,585,723	-	N/A
97-1WD	Monthly fees owed for equipped port maintenance	\$439,354	-	N/A
97-1WD	Cost overruns in relocating a main switch building	\$257,250	-	N/A
97-4WD	Performed directed work under delivery orders which exceeded NTE amounts	\$803,000	\$350,000	43.6%
97-11WD	Constructive Changes/ additional work	\$249,668	\$228,767	91.6%
98-3WD	Cost to repair damage to A/C leased by Government	\$59,514	\$58,235	97.9%
98-6WD	Additional costs incurred to repair wing damage caused by ground support equipment	\$24,805	\$24,794	99.9%
Totals		\$4,412,265	\$661,796	

Source: Developed by researcher

APPENDIX O NAWC-WD GOVERNMENT ACTION CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement amount	Settlement Rate
97-1WD	Delay, disruption and acceleration	\$1,072,590	-	N/A
97-1WD	Cost overruns on the TAS database	\$393,344	-	N/A
97-2WD	Cost overruns related to alleged access denial to buildings	\$45,790	-	N/A
97-6WD	Lost profits due to Govt. failure to order all supplies from requirements contract	\$849,596	\$63,000	7.4%
97-8WD	Lost fee on requirements contract from effort given to other contractors	\$79,000	\$40,311	51.0%
Totals		\$2,440,320	\$103,311	

Source: Developed by researcher

APPENDIX P NAWC-WD T4C-T4C CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement amount	Settlement Rate
97-5WD	Balance owed on progress pmts and deliveries arising from T for D	\$1,079,022	-	N/A
97-7WD	Correction of termination costs, additional effort	\$704,479	-	N/A
Totals		\$1,783,501	\$0	

Source: Developed by researcher

APPENDIX Q NAWC-TSD SPECIFICATIONS CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement amount	Settlement Rate
97-3TSD	Consolidation of 8 claims, spec changes	\$11,827,615	**	0%
98-2TSD	Additional effort to develop alleged NDI	\$31,548,315	\$12,180,000	38.6%
98-4TSD	Defective GFI	\$43,944	\$37,308	84.9%
Totals		\$43,419,874	\$12,217,308	

** Entire Amount Withdrawn

Source: Developed by researcher

APPENDIX R NAWC-TSD GFE/GFP CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement amount	Settlement Rate
97-4TSD	Late GFP	\$1,927,869	-	N/A
97-7TSD	SWO because of late GFI (Arabic Language Materials)	\$191,405	\$140,000	73.1%
97-8TSD	Late GFP	\$1,608,823	-	N/A
97-11TSD	Late GFP	\$403,083	**	0%
97-12TSD	Late GFP	\$11,364,627	-	N/A
97-15TSD	Late GFP	\$307,169	\$245,277	79.9%
98-1TSD	Late GFP	\$496,187	**	0%
Totals		\$16,299,163	\$385,277	

** Entire Amount Withdrawn

Source: Developed by researcher

APPENDIX S NAWC-TSD CONSTRUCTIVE CHANGES CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement amount	Settlement Rate
97-2TSD	Govt. direction caused additional expense	\$5,771,054	\$3,200,000	55.4%
97-11TSD	Govt. increased the work of the contract	\$604,625	**	0%
97-14TSD	Govt. directed changes to software baseline caused additional expense	\$450,000	\$335,000	74.4%
98-1TSD	Govt. increased the work of the contract	\$744,280	**	0%
Totals		\$7,569,959	\$3,535,000	

** Entire Amount Withdrawn

Source: Developed by researcher

APPENDIX T NAWC-TSD TERMS AND CONDITIONS CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement amount	Settlement Rate
97-6TSD	Underpriced proposal - mistake in pricing	\$43,340	\$0	0%
97-10TSD	Dispute in interpretation of ceiling price	\$557,683	-\$50,000	-9.0%
97-16TSD	NTE ceiling does not apply - provisioned order not definitized in 180 days	\$3,484,464	-	N/A
97-18TSD	Cost impact from unionization, collective bargaining agreement	\$1,333,262	**	0%
Totals		\$5,418,749	-\$50,000	

Source: Developed by researcher

APPENDIX U NAWC-TSD T4C/T4D CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement amount	Settlement Rate
97-1TSD	Appeal of T4D	\$1,700,000	\$2,000,000	117.6%
Totals		\$1,700,000	\$2,000,000	

Source: Developed by researcher

APPENDIX V NAWC-TSD GOVERNMENT ACTION CLAIMS

Claim Number	Basis of Claim	Claim Amount	Settlement amount	Settlement Rate
97-13TSD	Breach of software license	\$886,351	-	N/A
Totals		\$886,351		

Source: Developed by researcher

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